NOTES ON

REAL PROPERTY LAW

OF WASHINGTON

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EXPLANATORY NOTE

The subjects considered herein are the more common phases of the law of real property in this state. With few exceptions only those phases of these subjects are considered which concern a purchaser or mortgagee of real property. An endeavor has been made to cite the leading case or cases on each topic listed, and, where these decisions settle the law, to give a digest thereof without comment.

The topics are placed in alphabetical order with subheads in black face type and an occasional cross reference so that the place where most questions are discussed can be found without the use of the index. But that fact has not affected the completeness of the index. In its preparation an endeavor has been made to make it so that a layman as well as a lawyer can find any subject in which he is interested.

ACKNOWLEDGMENTS

§ 1. **Nature.** The act of a notary public in taking an acknowledgment is ministerial rather than judicial, so that the acknowledgment may be collaterally attacked; and the notary who took the acknowledgment is a competent witness to impeach it: Campbell v. Campbell, 146 Wash. 478.

§ 2. **Method of proof.** An acknowledgment cannot be proved by parol but only by the "certificate of the officer taking the same, and written upon or annexed to the instrument": Forrester v. Reliable Transfer Co., 59 Wash. 86, 92, and Smith v. Allen, 78 Wash. 135.

§ 3. **Lack of seal.** Lack of impress of the seal of the notary who took the acknowledgment is fatal to a declaration of homestead: U. S. Fidelity & Guaranty Co. v. Alloway, 173 Wash. 404. But see § 7 as to the effect of the omission of a seal from acknowledgments to deeds and mortgages.

§ 4. **Amendments.** Our supreme court never has been called upon to decide whether a certificate of acknowledgment may be amended by the official after the instrument has passed from his custody. The weight of authority is opposed to the right of amendment. See collection of authorities both for and against the right of amendment in 1 Corpus Juris p. 871.

§ 5. **Form.** Our supreme court has held in the cases of Kley v. Geiger, 4 Wash. 484, and Richmond v. Voorhees, 10 Wash. 316, that the statutory form of acknowledgment for an individual is not exclusive and that it is sufficient if the statutory form is substantially complied with.

§ 6. **Corporate acknowledgment.** The requirements for a corporate acknowledgment are more exacting than are those for an individual. Our court applied the "substantial compliance" rule in the case of Inland Finance Co. v. Ingersoll Co., 124 Wash. 72. But in the later cases of Yukon Investment Co. v. Crescent Meat Co., 140 Wash. 136 and Bank of Commerce v. Kelpine Products Corporation, 167 Wash. 592

it is held in effect that each "requirement" in the statutory form of acknowledgment is "substantial and essential;" and that, "The statute is not satisfiied with less than substantial compliance in all respects prescribed." The court further says that anything said in the case of Inland Finance Co. v. Ingersoll Co., supra, "inconsistent with the later case of Yukon Investment Co. v. Crescent Meat Co., supra, which we follow in the present case, may be considered overruled."

The opinion in the Yukon Investment Co. v. Crescent Meat Co. case says:

> "The acknowledgment appears to be fatally defective. The statute, Rem. Comp. Stat. § 10567, provides a form of acknowledgment for corporations. The form used in this case was that commonly provided for individuals, and lacks four essential elements of the statutory form for corporations: (1) fails to show that the person signing the mortgage was known to the notary to be an officer of the corporation which executed the mortgage; (2) that he acknowledged the same to be the free and voluntary act of the corporation; (3) that he was authorized to execute it on behalf of the corporation; and (4) that the seal affixed was the corporate seal."

§ 7. The problem of the title examiner is not in requiring compliance with the essentials enumerated in these cases for a corporate acknowledgment to a deed which is being executed, or as a condition to the acceptance of a deed. His problem arises when he must determine whether he will pass a deed lacking some of these essentials when the deed is of record and probably many years old. The danger of loss because of such a defect is more seeming than real. In each of the above cases holding that almost an exact compliance with the statutory form of acknowledgment was necessary, the court had under consideration the sufficiency of a chattel mortgage which requires an acknowledgment, among other things, to make it effective as to those who were in those cases contesting the mortgage. There is no statute making an unacknowledged deed ineffective as to any one; on the contrary, our court has held that an unacknowledged deed is good as between the parties and conveys an equitable title: Edson v. Knox, 8 Wash. 642; Carson v. Thompson, 10 Wash. 295; Bloomingdale v. Weil, 29 Wash. 611; Matson v. Johnson, 48 Wash. 256, and In re Deaver's Estate, 151 Wash. 454.

There are statutes giving purchasers and encumbrancers for value of real estate protection unless they have notice of the rights of others. This notice may be actual or constructive. Section 10599 of Rem. Rev. State. provides:

"Every instrument in writing purporting to convey or encumber real estate situated in this state, or any interest therein, which has been recorded in the auditor's office of the county in which such real estate is situated, although such instrument may not have been executed and acknowledged in accordance with the law in force at the time of its execution, shall impart the same notice to third persons, from the date of recording, as if the instrument had been executed, acknowledged, and recorded, in accordance with the laws regulating the execution, acknowledgment and recording of such instrument then in force."

The case of Rehm v. Reilly, 161 Wash. 418, holds that the recording of a purported copy of a deed is not constructive notice, but I do not think this case militates against the effect of constructive notice as provided by the section of the statute just above quoted.

§ 8. **Interest of notary.** A notary cannot, of course, take an acknowledgment of an instrument when he has an individual interest in the transaction and because of the fact that all property of a married person is presumed to be community property, one spouse may not take the acknowledgment of a deed or mortgage running to the other spouse unless it clearly appears that the funds, in case of a mortgage are, or the title, in case of a deed is, the separate property of the mortgagee or the grantee. In the latter case, the spouse of the grantee or mortgagee may take the acknowledgment: Nixon v. Post, 13 Wash. 181.

§ 9. A stockholder or officer of a corporation may take an acknowledgment of the execution of an instrument by, or to, his corporation if he is not interested in the instrument in his individual capacity: Rem. Rev. Stat. § 9903; Keene Guaranty Savings Bank v. Lawrence, 32 Wash. 572.

§ 10. **Liability of notary.** A notary must exercise great care as to the identity of the person whose acknowledgment he takes: Ehlers v. U. S. Fidelity & Guaranty Co., 87 Wash. 662.

But, "a notary is not a guarantor of the correctness of his certificate, and is not liable for making a certificate of acknowledgment for an imposter in the absence of negligence and failure to exercise proper care": Lee James Inc. v. Carr, 170 Wash. 29.

ADOPTED CHILD

See also, **DESCENT AND DISTRIBUTION, §136**

§ 11. An adopted child is issue: In re McCorkle's Estate, 128 Wash. 556.

An adopted child is a descendant: In re Waddell's Estate, 131 Wash. 566, and In re Hebb's Estate, 134 Wash. 424.

An adopted child may inherit both from his adoptive parent and his natural parent: Lindquist v. Roderick, 158 Wash. 377.

ADVERSE POSSESSION

§ 12. The limitations of actions to recover real property, and adverse possession are so interwoven that they will be considered together. The statutes limiting the time within which an action may be brought to set aside a sale made by an executor, administrator or guardian, and the decisions passing thereon, are not considered, as they are not regarded as falling under the classification of Real Property Law. The limitation of time for starting an action to cancel a tax deed will be considered under the heading of Tax Titles. I shall consider here the rights acquired to real estate by,

1. Adverse possession for ten years;

2. Adverse possession for seven years where the title is deducible of record from a public officer, this state or the United States;

3. Adverse possession for seven years with color of title and payment of taxes; and,

4. Payment of taxes for seven successive years on vacant and unoccupied land, with color of title.

§ 13. **What constitutes:** But first it is well to consider what constitutes "adverse possession," as that term is used

in our statutes and decisions. A clear and most succinct statement of what constitutes adverse possession is given by Thompson on Real Property and quoted with approval in Murray v. Bousquet, 154 Wash. 42. It reads:

> "Possession, in order to effect an ouster or disseisin of the true owner, must possess such notoriety that the owner may be presumed to have notice of it, so that the owner is guilty of laches in failing to assert his title during the statutory period against the claimant."

Our court apparently has endeavored to use this rule as its guide in deciding each case involving adverse possession, but it is not always an easy matter to determine whether the acts claimed to establish adverse possession do or do not meet these requirements. The case of Grays Harbor Com. Co. v. McCulloch, 113 Wash. 203, will illustrate this point. The court there had for determination whether title by adverse possession had been obtained to land covered by water where the tide ebbed and flowed, on the following facts:

> "Evidence was introduced that, in each fishing season since the respondent purchased, he has used so much of the property as was necessary for his nets and fishing appliances; and has asserted his ownership on more than one occasion by driving off trespassers, suing some of them, and by driving of piling and the destruction of piling driven by others. Some of these acts are in dispute, but it is conceded that, in addition to fishing upon some of the property with a side net for five months in each year, the respondent instituted two law suits against steam boat operators for running into and damaging his nets, in both of which actions he introduced in evidence his deed from the state; and that, in the year 1919, the respondent brought suit in the Federal court against the appellant to recover damages done by it to the respondent's fish net."

The legal holder (appellant) of the title maintained that the possessor (respondent),

> "not having title to the water flowing over the bed of the stream, and the fish running in the stream not belonging to any one but the first taker thereof, and the respondent having only a license to fish, that the appellant, seeing the respondent so fishing on this property, would not have called to his attention the fact that the respondent was doing more than exercising the public right of fishing;

that it was unnecessary to use the bed of the stream for that purpose, and that the case falls within the reasoning of those cases where it has been held that a person using vacant land for the purpose of pasturing cattle does not thereby give notice of adverse possession."

The court said:

"The answer to this, however, is that the respondent did everything with the property that from its nature was susceptible of being done, and that these acts were done with a claim of ownership. There was no necessity for him to post signs upon the property asserting his ownership, nor to engage in more extensive notice of his claim than the nature of the property called for."

§ 14. **Adverse possession for ten years.** There is no statute which provides that adverse possession of land for ten years gives title thereto. The statute which has the effect of transferring title says that no action shall be maintained for the recovery of land unless "the plaintiff, his ancestor, predecessor or grantor, was seised or possessed of the premises in question within ten years before the commencement of the action." Rem. Rev. Stat. § 156. Our court holds, in construing this statute, that adverse possession for ten years takes away from the true owner and transfers to the adverse occupant a perfect title not in form but in legal effect: Northern Pacific Ry. Co. v. Ely, 25 Wash. 384. This effect of adverse holding is recognized on the appeal of this case to the Supreme Court of the United States reported in 197 U. S. 1.

§ 15. Color of title is not necessary under this statute, only possession "under a claim of right": Williamson v. Horton, 157 Wash. 621, 624.

§ 16. There is a statutory provision for suspension of the time for recovery for personal disability of the person entitled to bring the action existing "at the time the cause of action accrued;" but when this or any statute of limitations starts it continues (McAuliff v. Parker, 10 Wash. 141) except for the statutory provision for suspension for a limited time by the death of the person entitled to bring such an action: Rem. Rev. Stat. §§ 169, 170.

§ 17. **Rights not barred.** Of course the rights of neither state nor nation can be barred by adverse possession without its consent. There was a statute brought over from territorial days which provided that the ten year limitation for recovery of real estate should "apply to actions brought in the name

of the state." Bal. Code, § 4807. This statute was amended in 1903 so as to exclude the state from its operation: Rem. Rev. Stat. § 167. Notwithstanding this territorial statute, our court held that it was not applicable to tide and shore lands or school lands: Brace & Hergert Mill Co. v. State, 49 Wash. 326; O'Brien v. Wilson, 51 Wash. 52, and State v. Seattle, 57 Wash. 602.

§ 18. Remaindermen are not bound to assert their title during the lifetime of the life tenant, and adverse possession under the ten year statute of limitations cannot be claimed against them under a deed from the life tenant purporting to convey the fee: McDowell v. Beckham, 72 Wash. 224, and Mielke v. Miller, 100 Wash. 119.

§ 19. A floating easement for a railroad right-of-way which had not been located is not barred by any lapse of time: Netherlands Am. Mtg. Bk. v. Eastern R. & L. Co., 142 Wash. 204.

§ 20. The right of individuals to acquire title to any part of the right-of-way granted by the United States to the Northern Pacific Railroad Company by either conveyance or adverse possession is now set at rest. In the first case involving this question the supreme court of the United States recognized the right of the public to acquire title for crossings, etc. Our court in State v. Ballard, 156 Wash. 530, 533, makes a clear statement of how this question has been settled. It is there said:

> "By act of Congress, passed in 1904 (33 U. S. Stat. at Large, p. 538), Congress declared:
>
> "'That all conveyances heretofore made by the Northern Pacific Railroad Company or by the Northern Pacific Railway Company, of land forming a part of the right of way of the Northern Pacific Railroad, granted by the Government by any Act of Congress, are hereby legalized, validated, and confirmed: Provided, That no such conveyance shall have effect to diminish said right of way to a less width than one hundred feet on each side of the center of the main track of the railroad as now established and maintained.'
>
> "Prior to the enactment of this law, the Supreme Court of the United States had held that no portion of the railroad right of way could be alienated, and that no title thereto could be acquired under the statute of limitations. Northern Pacific R. Co. v. Townsend, 190 U. S. 267. After the enactment of the 1904 statute above quoted, the supreme court of the United States, in the

cases of Northern Pacific R. Co. v. Ely, 197 U. S. 1, and Northern Pacific R. Co. v. Concannon, 239 U. S. 382, held that the act of Congress confirmed titles acquired within the outer one hundred feet of the two-hundred-foot right of way existing on each side of the center line of the railroad, whether acquired by grant or by adverse possession, it being held, however, that any title acquired by adverse possession must have ripened into a complete title by such adverse holding prior to the enactment of the act of 1904, and that only such titles by adverse possession as had become fully vested prior to that time were confirmed by the act."

§ 21. **Boundary disputes.** Most of the disputes and litigation in which adverse possession plays a part are over boundaries. In the case of Foote v. Kearney, 157 Wash. 681, it was held that under the facts of that case title by adverse possession had been acquired to a strip of an adjoining lot, while in White v. Branchick, 160 Wash. 697, it was held under the facts of that case title by adverse possession to a strip of an adjoining land had not been acquired. The opinions in these two cases discuss fully the principles governing adverse possession generally and with particular reference to boundary lines, and they cite and discuss most of the earlier cases by that court on this subject.

In the White-Branchick case it is said:

"Possession of land by another, under mistake as to the actual boundary, is not sufficient to defeat an action of ejectment by one holding the legal title, but who, owing to such mistake, has never had possession," citing seven cases by our supreme court. [This rule is followed in Lappenbusch v. Florkow, 75 Wash. Dec. 19.]

"The theory of appellants is that, since appellants and their predecessors in interest were the record owners of their lot as platted and dedicated, up to the true line, they were seized thereof, whether in possession or not, and that disseisin can only occur where there is an adverse and hostile entry, which must be made under a claim of right for the purpose of dispossessing the owner (Yesler Estate v. Holmes, 39 Wash. 34, 80 Pac. 851; McNaught-Collins Imp. Co. v. May, 52 Wash. 632, 101 Pac. 237) and that the entry must be hostile or it will be presumed permissive (Schmitz v. Klee, 103 Wash. 9, 173 Pac. 1026); that the facts as shown in this case do not prove any disseisin of them or their predecessors prior to 1918.

" 'It is not necessary, however, that the party in possession should have expressly declared his intention to

hold the property as his own, nor need his claim thereto be a rightful one. That his acts and conduct clearly indicate a claim of ownership is enough.' 1 R. C. L. 705, § 18.

" 'The intention of the party claiming adverse possession, and also the notice of such claim to the real owner, must be inferred from the acts and declarations of the parties.' Bowers v. Ledgerwood, 25 Wash. 14, 64 Pac. 936.

" 'These acts, which continued without interruption for a period of more than ten years, and until the commencement of this action, certainly evinced an assertion of permanent proprietorship on the part of respondents and all of their grantors, back to and including Taylor, and constituted notice to the real owners.' McCormick v. Sorenson, 58 Wash. 107, 107 Pac. 1055, 137 Am. St. 1047."

§ 22. **Title deducible from public official.** The statutory provisions discussed under this and the two succeeding subheads were enacted in 1893 as a part of the same act: Chapter XI, Laws of '93, §§ 786 to 790, inclusive, Rem. Rev. Stat.

The provisions of this act here considered read:

"All actions brought for the recovery of any lands, tenements or hereditaments of which any person may be possessed by actual, open and notorious possession for seven successive years, having a connected title in law or equity deducible of record from this state or the United States, or from any public officer, or other person authorized by the laws of this state to sell such land for the nonpayment of taxes, or from any sheriff, marshal or other person authorized to sell such land on execution or under any order, judgment or decree of any court of record, shall be brought within seven years next after possession being taken as aforesaid, but when the possessor shall acquire title after taking such possession, the limitation shall begin to run from the time of acquiring title."

"The heirs, devisees and assigns of the person having such title and possession shall have the same benefit of the preceding section as the person from whom the possession is derived."

There are no exceptions to the applicability of the foregoing provisions; nor is there any requirement for the payment of taxes. In Schlarb v. Castaing, 50 Wash. 331, it was held that minor owners of land who were not made parties to a suit to foreclose a mortgage which had been made by their ancestor were barred of all rights by "actual, open and notorious possession for seven successive years," claiming under a

sheriff's deed issued in pursuance of a decree of foreclosure; and that it was not necessary that the decree under which the sale was made be a "valid" decree.

These provisions were applied and title sustained in Grays Harbor Com. Co. v. McCulloch, 113 Wash. 203, and Aspinwall v. Allen, 144 Wash. 198. In each of these cases a deed from the state was held to be a title "deducible of record from this state or the United States."

§23. **Color of title, payment of taxes and possession.** The statute which gives or perfects a title when the requirements noted in this subhead have been complied with reads as follows:

> "Every person in actual, open and notorious possession of lands, or tenements under claim and color of title, made in good faith, and who shall for seven successive years continue in possession and shall also during said time pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title. All persons holding under such possession, by purchase, devise or descent, before said seven years shall have expired, and who shall continue such possession and continue to pay the taxes as aforesaid, so as to complete the possession and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section." § 788 Rem. Rev. Stat.

There is a full discussion of the prerequisites under this statute to obtain title in Lara v. Sandell, 52 Wash. 53. In stating the requirements as to payment of taxes it is said:

> "The only requirement of the latter section [788 Rem. Rev. Stat.] is that the adverse possession shall be continued for seven years, and that the occupant shall pay all taxes legally assessed during that time. To hold that seven years of adverse possession is not complete until seven years have elapsed after the first payment of taxes under claim and color of title made in good faith, is to add materially to the language of the statute."

Color of title under the sections of the statute considered in this and the succeeding sub-head may be a void deed, including a void tax deed: Lara v. Sandell, supra, and cases cited. If one is interested in this subject it will be well to read the discussion of what constitutes color of title, commencing at the bottom of page 207, vol. 113 of Washintgon reports, (Grays Harbor Co. v. McCulloch).

Exceptions. See copy of the statute under the next succeeding subhead for exceptions applicable to the sections of the statute here and there considered.

§ 24. **Vacant and unoccupied land, color of title and payment of taxes.** The most important part of the section of the statute here considered (§ 789 Rem. Rev. Stat.) reads:

> "Every person having color of title made in good faith to vacant and unoccupied land, who shall pay all taxes legally assessed thereon for seven successive years, he or she shall be deemed and adjudged to be the legal owner of said vacant and unoccupied land to the extent and according to the purport of his or her paper title."

The decisions cited under the preceding subhead as to what constitutes color of title are applicable to the provisions of this section as to color of title.

A different rule applies to payment of taxes in acquiring title to vacant and unoccupied land from the rule applicable when the claimant has possession and color of title. The section of the statute here considered provides that one claiming under its provisions must pay taxes for "seven successive years." Our court holds that this means that the taxes must be paid each successive year for seven years: Tremmel v. Mess, 46 Wash. 137; Seymour v. Dufur, 53 Wash. 646, and Kennedy v. Anderson, 88 Wash. 457, 461.

§ 25. **Exceptions.** The section of the statute making exceptions needs no comment. It applies to the provisions considered under this and the preceding subhead, and reads:

> "The two preceding sections shall not extend to lands or tenements owned by the United States or this state, nor to school lands, nor to lands held for any public purpose. Nor shall they extend to lands or tenements when there shall be an adverse title to such lands or tenements, and the holder of such adverse title is an infant or person under legal age, or insane: Provided, such persons as aforesaid shall commence an action to recover such lands or tenements so possessed as aforesaid, within three years after the several disabilities herein enumerated shall cease to exist, and shall prosecute such action to judgment, or in case of vacant and unoccupied land shall, within the time last aforesaid, pay to the person or persons who have paid the same for his or her betterments, and the taxes, with interest on said taxes at the legal rate per annum that have been paid on said vacant and unimproved land." § 790 Rem. Rev. Stat.

AFFIDAVITS

§ 26. The impression is quite general that almost any defect in a title can be cured by an affidavit, but I suggest that an affidavit is of no service as a part of a chain of title unless it may be introduced in evidence to support or strengthen some part of the evidence of title and that the only justified use in this state of an affidavit explaining or affecting anything in a chain of title is to show that one is a bona fide purchaser or encumbrancer under the rule established by our supreme court in the case of Sengfelder v. Hill, 21 Wash. 371. In this case, it is said:

> "The appellants claim protection under the first section of the act of the legislature of March 9, 1891 [Rem. Rev. Stat. 10577]. That section reads as follows:
>
> " 'Whenever any person, married or single, having in his or her name the legal title of record to any real estate, shall sell or dispose of the same to an actual bona fide purchaser, a deed of such real estate from the person holding such legal record title to such actual bona fide purchaser shall be sufficient to convey to, and vest in, such purchaser the full legal and equitable title to such real estate free and clear of any and all claims of any and all persons whatsoever, not appearing of record in the auditor's office of the county in which such real estate is situated.'
>
> "Conceding that this section has the broad effect contended for by the appellants, it would still be insufficient to protetct them in their purchase of tract A. The protection is granted to a 'bona fide purchaser,' which is almost universally construed to mean a purchaser without notice or knowledge of an outstanding superior title."

It is true that our supreme court, in the case of Singer v. Guy Investment Co., 60 Wash. 674, recognizes the sufficiency of an affidavit to establish the marital status of one appearing in a chain of title. However, I suggest that the holding in this case should be followed with caution. I shall discuss this question further under the subheads, "Determination of Status" and "Marital Status," §§ 66 and 98, under the topic, COMMUNITY PROPERTY.

My reason for placing this limitation on the use of an affidavit in a chain of title is that constructive notice is imparted only by those instruments and proceedings which the law authorizes or directs to be filed or recorded, (Howard v.

Shaw, 10 Wash. 151; Fischer v. Woodruff, 25 Wash. 67; Dial v. Inland Logging Co., 52 Wash. 81, and State Bank of Black Diamond v. Johnson, 104 Wash. 550) and then only when such instrument or proceeding is filed or filed and recorded in such manner and in such office as directed by law: Dunsmuir v. Port Angeles Gas etc. Co., 24 Wash. 104, and Bonneviere v. Cole, 90 Wash. 526.

There is no statutory authority in this state for the filing or recording of an affidavit to explain or clear any question arising in a title to real estate and such affidavit does not, therefore, give constructive notice.

Our court has refused to accept an affidavit to establish heirship: Watson v. Boyle, 55 Wash. 141, and Crosby v. Wynkoop, 56 Wash. 475. The same reason which justifies the use of an affidavit to establish marital status justifies its use to establish heirship: 10 Ruling Case Law, 963 and 964; 7 A. L. R. 1172, and Attebery v. Blair (Ill.), 135 Am. St. R. 342.

ALIEN OWNERSHIP OF LAND

§ 27. **Constitutional provision.** Section 33 of article 2 of our constitution reads:

> "The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of land hereafter made to any alien directly, or in trust for such alien, shall be void: Provided, that the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal, or fire clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purposes of this prohibition."

§ 28. **Enforcement.** There was enacted in 1921 a statute, commonly known as the Anti-alien Land Ownership Law, the

purpose of which was to make more effective the above constitutional prohibition against land ownership by aliens. I will consider first the effect of treaties on the constitutional provision and the '21 act, the construction of the '21 act, next our decisions construing this constitutional provision which are unaffected by the '21 act, and then the effect of the provisions of this act on alien ownership, the decisions construing parts of the act and the effect of the act on the constitutional provision and prior decisions.

§ 29. **Treaties.** A treaty "touching any matter which is properly the subject of negotiation with a foreign county" is "the supreme law of the land." The right to acquire and hold land within the states of the Union is a proper subject of treaty regulation: Geofroy v. Riggs, 133 U. S. 258, and In re Stixrud's Estate, 58 Wash. 339.

The prohibition in the '21 act against an alien acquiring a leasehold interest in land except "for a purpose for which an alien is accorded the use of land by a treaty between the United States and the country whereof he is a citizen" does not violate the treaty between the United States and Japan: Terrace v. Thompson, 263 U. S. 197. This case involved a lease of agricultural lands and does not pass upon the attempted limitation of ten years to leases for purpose allowed by treaty.

The provision of the treaty between the United States and Great Britain relating to the right of disposition and succession of personal property is not violated by the provision of the '21 act defining land to include every interest in lands and the "rents, issues and profits thereof": State v. O'Connell, 121 Wash. 542.

§ 30. **Constitutionality of the '21 act.** The act (§ 10591 of Rem. Rev. Stat.) provides:

> "If any section or provision of this act shall be adjudged to be invalid or unconstitutional, such adjudication shall not [a]effect the validity of the act as a whole or any section, provision, or part thereof not adjudged invalid or unconstitutional."

Most of the essential provisions of the act have been sustained as constitutional. The leading cases passing on such questions are Terrace v. Thompson, 263 U. S. 197; State v. O'Connell, 121 Wash. 542, and State v. Hirabayashi, 133 Wash. 462. See also notes to sections 10581 and 10582 of Rem. Rev. Stat.

§ 31. **Effect of deed to alien.** Title passes from a grantor to an alien grantee who is not qualified to hold land, and only the state can divest him of the title, and then only by direct proceedings for that purpose: Oregon Mortgage Co., Ltd. v. Carstens, 16 Wash. 165; Goon Gan v. Richardson, 16 Wash. 373; Abrams v. State, 45 Wash. 327; State ex rel. Atkinson v. World Real Estate Com. Co., 46 Wash. 104; Keene v Zindorf, 81 Wash. 152; Prentice v. How, 84 Wash. 136; State ex rel. Dunbar v. Shokuta, 131 Wash. 291; State v. Kosai, 133 Wash. 442, and State v. Kurita, 136 Wash. 426.

§ 32. **Exceptions.** An individual whose land is sought to be condemned can question the right of an alien corporation to take land in condemnation proceedings: State ex rel. Morrell v. Superior Court, 33 Wash. 542.

And a vendor can cancel a contract of sale made with an alien when he did not know his purchaser was an alien when he made the contract: Baker v. Knight, 160 Wash. 500.

§ 33. **Deed in lieu of foreclosure.** An alien mortgagee can acquire a good title by a deed in lieu of the foreclosure of his mortgage: Oregon Mortgage Company v. Carstens, 16 Wash. 165.

§ 34. **Alien corporations.** A conveyance to a corporation a majority of whose stock is owned by aliens comes within the constitutional prohibition; and such prohibition applies when such condition arises, although at the time the conveyance was made a majority of the stock was owned by citizens: State ex rel Winston v. Hudson Land Co., 19 Wash. 85.

§ 35. **Minerals.** The section of the constitution prohibiting alien ownership of lands excepts from its application "lands containing valuable deposits of minerals, metals, iron, coal or fire clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom." In State ex rel Atkinson v. Evans, 46 Wash. 219 the state questioned the right of an alien to own lands containing limestone, silica, silicated rock and clay to be used in the manufacture of cement. In holding that these were "minerals" the court said:

> "We must, therefore, conclude that each of the words 'minerals,' 'metals,' 'iron,' 'coal,' or 'fire clay,' was used for a purpose in its natural and ordinary meaning, leaving as little as possible to implication or interpretation, and that one word was not used necessarily to restrict or modify the meaning of another word, but was used to make

definite the rights of aliens to acquire lands containing valuable deposits of minerals, whether metals or not, and any kind of metals whether iron or not, and any kind of iron, coal, or fire clay, where such lands are chiefly valable for such minerals."

§ 36. **Leases prior to the '21 act.** The constitution does not by express terms prohibit a lease of land to an alien; and a lease of any kind of land for a reasonable time was good prior to the '21 act: State v. Natsuhara, 136 Wash. 437, and cases cited. A lease for ten years is a reasonable time: State v. Natsuhara, supra, and State v. Motomatsu, 139 Wash. 639. A lease for ninety-nine years is for an unreasonable time and within the constitutional prohibition: State ex rel Winston v. Morrison, 18 Wash. 664. The same is true of a lease for forty-nine years: State ex rel Winston v. Hudson Land Co., 19 Wash. 85.

In State v. Natsuhara, 136 Wash. 437, it is held that the '21 act did not attempt to declare illegal an existing valid lease.

§ 37. **Leases subsequent to the '21 act.** The definition of "Land" in the '21 act (§ 10581 Rem. Rev. Stat.) includes leasehold interests except "for a period of not more than ten years for a purpose for which an alien is accorded the use of land by a treaty between the United States and the country whereof he is a citizen." In Terrace v. Thompson, 263 U. S. 197, it was held that this act prohibited the leasing after its enactment to a citizen of Japan of agricultural land for any length of time and that such prohibition does not contravene either the due process clause or equal protection clause of the U. S. constitution and does not conflict with the U. S. treaty with Japan.

§ 38. **Conveyance by alien.** While there is some question as to the right of an alien who has taken title in contravention of the constitution to pass a good title **after** the effective date of the '21 act, there is no question but that prior to that time he could have passed a good title at any time prior to the institution of escheat proceedings by the state: Oregon Mortgage Company v. Carstens, 16 Wash. 165; Goon Gan v. Richardson, 16 Wash. 373; Abrams v. State, 45 Wash. 327; State ex rel Atkinson v. World Real Estate Com. Co., 46 Wash. 104; Keene v. Zindorf, 81 Wash. 152; Prentice v. How, 84 Wash. 136; State ex rel Dunbar v. Shokuta, 131 Wash. 291; State v Kosai, 133 Wash. 442, and State v. Kurita, 136 Wash. 426.

This right went to the extent of allowing an alien qualified only to take and hold a good title under the constitutional exception of taking title by inheritance, etc., to inherit and

hold a good title from an alien who had taken title in contravention of the constitution: Abrams v. State, 45 Wash. 327.

§ 39. **Effect of '21 act on conveyance by alien.** There is nothing in the Anti-alien Land Ownership Law which changes the rule of law theretofore prevailing that a title passes by deed to an alien. But can an alien since the effective date of this act pass a good title to another?

It was the apparent intent of the legislature by this act to assert the right of the state to lands then held by aliens, and to prevent an alien who thereafter acquired title to land from passing good title thereto, unless, in either case, the title passes to a bona fide purchaser. This intent is manifested by §§ 2 and 10 of the act (§§ 10582 and 10590 of Rem. Rev. Stat.) which read as follows:

> "An alien shall not own land or take or hold title thereto. No person shall take or hold land or title to land for an alien. Land now held by or for aliens in violation of the constitution of the state is forfeited to and declared to be the property of the state. Land hereafter conveyed to or for the use of aliens in violation of the constitution or of this act shall thereby be forfeited to and become the property of the state."
>
> "This act shall not impair any title or right heretofore or hereafter acquired from or derived through an alien in good faith and for value by a person not under an alien's disability."

Will the courts give effect to this intent or will they hold that an alien may still pass a good title to one entitled to hold land at any time prior to the starting of escheat proceedings by the state? This question has never been presented to our supreme court. There are arguments in support of both the affirmative and the negative sides of the question. The answer will not be known until given by our supreme court and if its answer is that an alien holding or taking title contrary to the constitution cannot pass good title to any one except a bona fide purchaser, the answer may not be final until the question is decided by the United States Supreme Court. I do not regard it as within the scope of these "Notes" to give any of these arguments, or to express an opinion on this question.

§ 40. **Limitation of time for legal holding.** The constitution excepts from prohibited ownership of land by aliens such as may be acquired by "inheritance, under mortgage or in good faith in the ordinary cause of justice in the collection of debts." There is no limitation placed on the length of time a

title so acquired may be held. The act of '21 (§ 10584 of Rem. Rev. Stat.) provides:

> "If hereafter an alien acquire land by inheritance or in good faith either under mortgage or in the ordinary course of justice in the collection of debts and, remaining an alien, hold the same for more than twelve years from the date title was so acquired or control or possession taken, the land shall be forfeited to the state."

The right of the legislature to place a limitation on the length of time property acquired by inheritance, etc., may be held never has been before our supreme court. I shall not discuss the question but suggest the possibility of any limitation by the legislature being in contravention of the unlimited right granted by the constitution.

§ 41. **Limitation by '33 act.** The section of the '21 act just above quoted was amended by Laws of 1933, p. 431. The effect of this amendment is to remove all limitation on the time an alien may hold property acquired by inheritance, etc., prior to the effective date of the '33 law and to place a limitation of sixteen years on property so acquired on and after such date. I doubt if it was the intention of the framers of this act to so provide, but the wording of the amendment is such that that is the result. I give my reasons for this conclusion. The '33 act provides:

> "Section 1. That section 4, chapter 50 of the Laws of 1921, be and is amended to read as follows:
> "Section 4. If hereafter an alien acquire land by inheritance or in good faith either under mortgage or in the ordinary course of justice in the collection of debts and, remaining an alien, hold the same for more than sixteen years from the date title was so acquired or control or possession taken, the land shall be forfeited to the state."

Our court, in Henry v. McKay, 164 Wash. 526, 534, quotes with approval from Spokane & Eastern T. Co. v. Hart, 127 Wash. 541, as follows:

> "Where a section of a statute is amended by an act which purports to set out in full all it is intended to contain, any matter which was in the original section but not in the amendatory section is repealed by the omission."

Under this ruling, the provision of the '21 act under consideration ceased to exist when the '33 act became effective.

Neither of these acts carries an emergency clause and each became effective ninety days after the adjournment of the legislature at which it was enacted: State v. Motomatsu, 139 Wash. 639. The 1933 legislature adjourned March 9, 1933, and the 1921 legislature adjourned March 10, 1921. The 1933 law then went into effect one day less than twelve years after the effective date of the '21 law. Therefore no land had been held by an alien twelve years after the effective date of the '21 law when this limitation was repealed by the '33 act, and this act attempts to place a limitation of sixteen years after the effective date of the '33 act within which land may be held when acquired by inheritance, etc.

ALIENATION, RESTRAINT ON

See ESTATES, § 148

ASSESSMENTS

See also TAXES

§ 42. The duration of the lien for assessments is the only one of the many questions pertaining to assessments which I regard as within the scope of these "Notes."

Limitation on enforcement. Section 9394 of Rem. Rev. Stat. reads:

> "An action to collect any special assessment or installment thereof, for local improvements of any kind, or to enforce the lien of any such assessment or installment, whether such action be brought by a municipal corporation or by the holder of any certificate of delinquency, or by any other person having the right to bring such action, shall be commenced within ten years after such assessment shall have become delinquent, or within ten years after the last installment of any such assessment shall have become delinquent when said special assessment is payable in installments."

§ 43. **Exception.** The limitation fixed by this statute applies only to assessments levied under the local improvement

statute and does not apply to assessments levied under the statute providing for improvements under condemnation proceedings, which are a perpetual lien until paid: State v. Seattle, 138 Wash. 449, and cases cited.

§ 44. **Effect on lien by foreclosure of general taxes.** The effect on the lien for assessments by the foreclosure of the general tax lien is now settled, with one exception, by the decisions in Maryland Realty Co. v. Tacoma, 121 Wash. 230; Everett v. Morgan, 133 Wash. 225, and Tacoma v. Fletcher Realty Co., 150 Wash. 33. I give below the questions now settled and the one remaining unsettled.

1. Where the county forecloses the lien of general taxes and bids the property in and later sells the property to a private individual, such purchaser takes the property free from any municipal assessment, provided the municipality having the lien was duly notified in the tax foreclosure case: Maryland Realty Co. v. Tacoma, 121 Wash. 230, and Everett v. Morgan, 133 Wash. 225;

2. Where a county forecloses and at the sale a private party bids in the property, the lien of municipal assessments is not cut off, regardless of whether the municipality was served with notice in the tax foreclosure case: Tacoma v. Fletcher, 150 Wash. 33, and

3. Where a private party forecloses a delinquent tax certificate and buys in the property, such purchaser takes the property subject to existing municipal assessments: Rem. Rev. Stat. § 9393.

The unsettled question is whether, on a tax foreclosure case by a county instituted subsequent to Jan. 9, 1926, when the law hereinafter referred to became effective, the lien of municipal assessments is cut off when the municipality is not served with notice of the foreclosure as provided by statute. In the case of Everett v. Morgan, supra, the court had under consideration the provisions of sections 11295 and 9393 of Rem. Rev. Stat. and held that these two sections must be read together and that it was necessary for a county as well as an individual to serve a copy of the complaint in a tax foreclosure case on the city treasurer of a municipality having a lien and held that such service was necessary to remove the lien. This law was amended in 1925 (§ 11278 Rem. Rev. Stat.). That part affecting the question under consideration reads:

"* * * It shall be the duty of the county treasurer to mail a copy of the published summons, within fif-

teen (15) days after the first publication thereof, to the treasurer of each city or town within which any property involved in a tax foreclosure is situated, but the treasurer's failure to do so shall not affect the jurisdiction of the court nor the priority of any tax sought to be foreclosed. * * * "

Does this provision change the rule announced in Everett v. Morgan, supra, so that if this notice is not given the municipal assessment will still be wiped out and a purchaser from the county take the property free therefrom? I express no opinion on this question.

ASSIGNMENTS FOR BENEFIT OF CREDITORS

When one of the links in a chain of title is a deed from an assignee or trustee under an assignment for the benefit of creditors, a serious problem is presented the examiner.

§ 45. **State insolvency act.** If the assignment comes with the state insolvency act (§ 1086, et seq. Rem. Rev. Stat.) it is not safe to pass such a deed, as a state insolvency law is superseded by the Federal Bankruptcy Act: International Shoe Co. v. Pinkus, 278 U. S. 261. See also Armour v. Becker, 167 Wash. 245, and Tacoma Grocery Co. v. Doersch, 168 Wash. 606, in which our court admits that the ruling in the Pinkus case controls and overrides some of its prior decisions.

§ 46. **Common law assignment.** Our court holds that both an individual and a corporation may make a common law assignment for the benefit of creditors: Hurwitz v. Starwich, 130 Wash. 1, and cases cited. It is not safe to pass a deed from the assignee or trustee of either an individual or a corporation within four months after the delivery of such assignment as the assignment is an act of bankruptcy. When four months have elapsed after delivery of an assignment, there are still several questions to be considered and determined. These are now set out.

1. If either an individual or a corporation is the assignor and the assignment is for the benefit of all the creditors of the

assignor, it is an open question whether it is effective as to a creditor who could not have instituted bankruptcy proceedings because of the size of his claim. In the case of International Shoe Co. v. Pinkus, supra, it is said:

> "As all the proceedings were had under the Arkansas insolvency law, we need not decide whether, independently of statute, an assignment for the benefit of creditors on the conditions specified in the decree would protect the property of the insolvent from seizure to pay the judgment."

If the creditor could have invoked the aid of a court of bankruptcy he will not be later aided by the courts in collecting his claim to the detriment of other creditors: Boese v. King, 108 U. S. 379.

2. If a corporation is the assignor and the assignment does not provide for the distribution of the assets ratably among all of its creditors, then the assignment is probably ineffective because contrary to the theory that the assets of an insolvent corporation constitute a "trust fund" for its creditors. This "trust fund" theory is fully considered and approved in Conover v. Hull, 10 Wash. 673.

3. Power of assignee or trustee. Unless the assignment gives the trustee or assignee power to sell it is doubtful if a valid sale can be made without the assent of those beneficially interested. Of course a power of sale may be embodied in general terms, or by necessary implication by reason of a direction to liquidate the assets of the assignor and distribute the proceeds.

ATTACHMENT

§ 47. The lien of an attachment is not dissolved by the death of the attachment debtor prior to judgment: Hawley v. Isaacson, 117 Wash. 197.

§ 48. A purchaser of real estate under an executory contract has such rights as come within the designation of "real property" so that an attachment may be levied against his interest: State ex rel Oatey Orchard Co. v. Superior Court, 154 Wash. 10, and Eply v. Hunter, 154 Wash. 163.

§ 49. When an attachment is levied a lis pendens is not necessary: Dill v. Bush, 86 Wash. 525.

ATTORNEYS

See JUDGMENTS, Satisfaction by Attorney, § 203

ATTORNEY IN FACT

See, HUSBAND AND WIFE, § 194
POWERS OF ATTORNEYS, § 275

AWARD IN LIEU OF HOMESTEAD

See, PROBATE PROCEEDINGS, § 280

BANKRUPTCY

§ 50. **Sale free of liens.**- Bankruptcy courts have power to order that property of a bankrupt's estate shall be sold free from liens, including liens for state taxes, and that such liens shall be transferred to the proceeds: Van Huffel v. Harkelrode, 284 U. S. 225.

§ 51. **Non-resident bankrupt.** "The title and right to possession of all property owned and possessed by the bankrupt vests in the trustee as of the date of filing of the petition in bankruptcy, no matter whether situated within or without the district in which the court sits": Isaacs v. Hobbs Tie & Timber Company, 282 U. S. 734.

Under the holding in this case it becomes important to know in every case where an interest in or lien on real estate is held by a non-resident and such interest is passed or lien discharged by voluntary act or involuntary proceeding that no proceedings to have such non-resident adjudged a bankrupt had been filed when such act was performed or proceeding instituted.

§ 52. **Jurisdiction of referee.**- The words "any court of bankruptcy" in § 60 of the bankruptcy act include the referee in bankruptcy and invest him with the power possessed by courts of bankruptcy under §§ 23 and 60 of the act. While under the provisions of the bankruptcy act the exercise of his jurisdiction by the referee is ordinarily restricted to those matters which may be dealt with summarily by the method of procedure available to referees in bankruptcy, the restriction may be removed by the consent of the parties to a summary trial of the issues presented: MacDonald v. Plymouth County

Trust Co., 286 U. S. 263, and Page v. Arkansas Natural Gas Co., 286 U. S. 269.

§ 53. **Finality of homestead awards.** In State ex rel. O'Brien v. Superior Court, 74 Wash. Dec. 11, the court had under consideration the right to the possession of mortgaged property during the period of redemption. The property had been set apart to the fee owner as a homestead in bankrtucy proceedings and such owner claimed that such award was res judicata in the foreclosure case. In passing upon this contention the court says:

> "Remington on Bankruptcy, § 1342, lays down the pertinent rule as follows:
>
> " 'The order of the bankruptcy court setting aside or approving the report of the trustee setting aside property as exempt is **res judicata** in the state courts as elsewhere as to all creditors properly notified of the bankruptcy.'
>
> "Such must be the rule, we think, and this case well illustrates the reason therefor."

No comment is made in this case on the earlier case of Lyon v. Herbath, 133 Wash. 15, in which it was held as stated in the syllabus:

> "The judgment of a bankruptcy court setting aside specific real property as the homestead of the debtor, does not affect the lien of a purchase money judgment, obtained against the debtor prior to the bankruptcy proceedings, and is not **res adjudicata** of the superiority of the exemption over the prior judgment lien."

Somewhat in line with the O'Brien case is the holding in the case of McKinley v. Morgan, 36 Wash. 561, that the finding of the Referee in Bankruptcy that there were "no assets except such as are claimed exempt and found by the court to be exempt" was a conclusive adjudication of the bankruptcy court and a sale thereafter of property of the bankrupt under execution in the state court was void.

§ 54. **Claim not discharged.** Where a claim or judgment is scheduled in a bankruptcy proceedings it is necessary to examine the pleadings to determine the nature of the liability and thus determine whether such liability was subject to discharge by the bankruptcy court: In re Pulver, 146 Wash. 597, and Guernsey-Newton Co. v. Napier, 151 Wash. 318.

Judgment for damages for alienation of affections is not one that is dischargeable in bankruptcy: Allard v. LaPlain, 147 Wash. 497.

BONA FIDE PURCHASER

§ 55. A bona fide purchaser is defined as one who is "without notice" or knowledge of an outstanding superior title: Sengfelder v. Hill, 21 Wash. 371.

The exercise of reasonable diligence is necessary to one being a bona fide purchaser: Adams v. Black, 6 Wash. 528.

A creditor buying at his own judicial sale is not an innocent purchaser and, not being an innocent purchaser for value, there can be no estoppel in his favor: Vandin v. Henry McCleary Timber Co., 157 Wash. 635 (and cases therein cited) and Tallyn v. Cowden, 158 Wash. 335.

BOUNDARIES, ENCROACHMENTS AND OVERLAPS

§ 56. These three subjects are considered together because they are so intimately connected. Nothing short of a survey of property will determine whether encroachments or overlaps exist, or what are the boundaries of a tract of land. These questions are seldom covered by title insurance and never by an abstract. Most title policies carry a provision substantially as follows:

> "The Company does not insure against questions of boundary or area dependent upon survey for determination, or encroachments by improvements belonging to this or adjoining property."

In Ziebarth v. Manion, 161 Wash. 201, it is held that an encroachment of from 3½ to 7⅛ inches is of such a substantial character as to render the vendor's title unmarketable and permit recovery of earnest money paid.

There is a most excellent note on the subject of encroachments and overlaps in 57 American Law Reports commencing at page 1443.

BUILDING RESTRICTIONS
See, RESTRICTIVE COVENANTS, § 288

COMMON LAW TRUSTS

§ 57. So-called common law trusts are not entitled to do business in this state, (State ex rel Range v. Hinkle, 126 Wash. 581) and such trusts, in proper proceedings, may be excluded from doing business in the state (State ex rel Colvin v. Paine, 137 Wash. 566) but it is said in the case of Denny v. Cascade Platinum Co., 133 Wash. 436, 440:

> "It may be conceded that that trust has no standing in law as a legal, suable entity. That, however, does not mean that the trustees of the property that happens to be held in that name may not seek in the courts protection of the property rights of the beneficiaries of that trust."

COMMUNITY PROPERTY

§ 58. **Origin and meaning.** The common law was adopted as the basic law of Washington at the 1863 session of the Territorial Legislature of Washington and has continued as such to the present day: Rem. Rev. Stat., § 143. In 1869 a modified form of the community property law was adopted (Holyoke v. Jackson, 3 Wash. Ter. 235) and with few changes continues to be the law of the state: Rem. Rev. Stat. §§ 6890 to 6899 inclusive and § 1342. There has been no change in the law since the Code of 1881. It is probably well here to say that dower and curtesy are expressly abolished as is survivorship between joint tenants: Rem. Rev. Stat. §§ 1343 and 1344.

The common law, as that term is used in America, had its origin in England while the community property system originated under the civil law and the earliest record thereof will probably be found in the laws of Spain. If one is interested in the history of the community property system it is well worth his while to read the opinion of the court in the case of Saul v. His Creditors (Louisiana), 16 Am. Dec. 212, and the

statement by Judge Dunbar in Brotton v. Langert, 1 Wash. 73, 78, of the object sought to be effected by the community property law and the opinion in Bortle v. Osborne, 155 Wash. 585. The common law theory of the rights of husband and wife in real property and the civil law theory thereof differ widely. The lack of harmony in their basic principles creates for the examiner of titles to land in this state rather treacherous shoals over which to navigate his boat.

§ 59. **What is community property?** Our statute does not define community property except in negative form. It tells us that all property owned by a married person at the time of his or her marriage and property afterwards acquired by gift, devise or inheritance, with the rents, issues and profits thereof, is his or her separate property and that all other property is community property.

§ 60. **What is a community?** The meaning of the word "community" in the phrase "community property" is not given by statute nor can its meaning be found in any single decision of our supreme court. Our reports are full of cases passing on the character of property — whether separate or community; and the character of a debt—whether separate or community. In many of these cases it has been necessary as a preliminary to the decision to determine whether there existed a marital community contemplated by the statute. In a few of these cases the court has considered whether this "community" was a separate entity.

I am unable to reconcile the decisions of our supreme court on the question of whether a marital community is a separate entity. The last decision is that of Bortle v. Osborne, 155 Wash. 585, rendered in 1930. It holds that a marital community is not an "entity." It was necessary to answer the question in order to decide the case, and it is assumed in the opinion that it was not necessary to answer the question in order to reach a decision in the earlier cases where it is discussed. We must accept this last word by the supreme court as final.

§ 61. **Essentials of a marital community.** A valid marriage is the first essential: In re Sloan's Estate, 50 Wash. 86, 90, and cases cited; and common law marriages are not good in this state: Stans v. Baitey, 9 Wash. 115, and Sortore v. Sortore, 70 Wash. 410. In in re Sloan's Estate, supra, it is said:

> "If there was no lawful marriage between the appellant and Mary Steves, as a matter of course there is and can be no community property."

§ 62. It is proper to say parenthetically that when the relation of husband and wife is entered into and followed in good faith the court will make a fair division of the property acquired by the parties while living together: Buckley v. Buckley, 50 Wash. 213; In re Brenchley's Estate, 96 Wash. 223; Kroll v. Kroll, 104 Wash. 110, and Powers v. Powers, 117 Wash. 248.

§ 63. In order to constitute a marital community the domicile of a husand and wife does not have to be in this state. The presumption in the absence of proof is that the law of another state is the same as ours: Dormitzer v. German Savings & Loan Society, 23 Wash. 132, and Clark v. Eltinge, 38 Wash. 376, 378. So that land acquired by a non-resident married person is presumed to be community property: Armstrong v. Ooakley, 23 Wash. 122. But if it is shown that the law of the domicile of a non-resident holds the consideration paid for the Washington property to be the separate property of the purchaser, then our court holds that the property here is his or her separate property: Brookman v. Durkee, 46 Wash. 578; Meyers v. Albert, 76 Wash. 218, and Myers v. Vagetti, 146 Wash. 1.

§ 64. When funds are brought into this state and invested in property here, figuratively speaking, our law meets the investor at the border of the state and determines the class to which such funds belonged in the state of the domicile of the investor and places such funds in the class here corresponding to the one they belonged in the state of the domicile of the investor. Thereafter they are administered here according to our laws governing such class of property.

§ 65. **Debts contracted in another state.** The same principle of law which determines the class into which Washington property falls when purchased by a married person with funds acquired while domiciled in another state determines the nature of a debt contracted by a married person while domiciled in another state. This question was considered by our court in the case of La Selle v. Woolery reported in 11 Wash. 337 and 14 Wash. 70. The facts were that La Selle contracted a debt in Wisconsin while domiciled there with his wife. The La Selles moved to Washington and acquired property here which under our law was community property. A Wisconsin creditor secured a judgment against the husband, levied on this property and the wife sought to enjoin the sale. It was shown that Wisconsin did not have the community property system; that if the debt had been contracted here it would have been a community debt and if the property here had been acquired

in Wisconsin it would have been the husband's separate property and liable for the debt.

In the last opinion, reported in 14 Wash. 70, overruling the one reported in 11 Wash., it is said:

> "The character of the property, as regards the question of its being the separate property of either of the spouses, or the property of the community consisting of both spouses or otherwise, is fixed by the law of the state where such property, if real property, is situated. So, too, the character of the debt is determined by the law of the place where it arose. If by the law of Wisconsin it was the sole individual debt of the husband, it retained that character here. Its status was fixed by the law of the place of its creation. The debt which the appellants are here seeking to enforce, being by the law of Wisconsin where it arose merely the separate individual debt of the husband, enforcible only against his separate individual property, it follows that the judgment rendered upon that deft cannot be satisfied out of the real property of the community acquired in this state long after the debt arose and judgment was rendered upon it."

§ 66. **Determination of status.** Every deed, and every existing mortgage, made by an individual, in a chain of title, presents the question of whether the property was separate or community; and if the latter, who were the members of such community when the title was acquired. The fact that a deed or mortgage is executed by a husband and wife does not mean that it can be passed without determining whether the property was the separate property of one or the other of them or that they were husband and wife when the title to the property was acquired. The status of property becomes fixed at the time of its acquisition, and the spouse joining with the one in whose name the record title stands may not have been his or her spouse when it was acquired.

§ 67. **Status of property fixed when acquired.** The outstanding decision announcing the principle that the status of property, whether separate or community, is fixed at the time of its acquisition in Rawleigh v. McLeod, 151 Wash. 221. It was rather harsh to apply the principle under the facts of the case, but the court felt constrained so to do. In part the opinion reads:

> "The chief and only real dispute in the testimony is as to the value of the farm lands when they were acquired, and as to their present value. If it be necessary to fix these values, we would hold from the record before us

that the lands were worth not to exceed one thousand dollars when acquired, probably somewhat less, and that the present value is less than one thousand dollars in excess of the cost of the improvements. In other words, the community has put at least forty-five hundred dollars in money and labor into improvements on the land, which, so improved, is now worth not more than five thousand dollars.

"But the real question here is, In whom is the title now vested? The property was acquired in 1905 in exchange for separate property of respondent Olson, and we must hold that title was then vested in him alone and, by that conveyance, the community obtained no interest. We have said in a long line of cases that the status of real property is fixed as of the time when it was acquired. Our previous holdings to that effect, fourteen cases in all, are cited in In re Brown's Estate, 124 Wash. 273, 214 Pac. 10, and since that time we have continued with unbroken regularity to recognize the principle. Riverside Finance Co. v. Griffith, 140 Wash. 322, 248 Pac. 786; Norman v. Levenhagen, 142 Wash. 372, 253 Pac. 113; In re Williams' Estate, 145 Wash. 19, 258 Pac. 851. See, also, In re Hart's Estate, 149 Wash. 600, 271 Pac. 886. This is a wholesome rule and we cannot now depart from it."

§ 68. **Community credit.** Where part of the purchase price of property is the separate property of one of the spouses and the remainder is by note and mortgage signed by both spouses, the community credit is pledged, and the community interest in the property is in proportion as the amount of the mortgage bears to the entire price: Zintheo v. Goodrich Rubber Co., 136 Wash. 196, and Walker v. Fowler, 155 Wash. 631. The latter case collects most of the prior decisions on this question and overrules a contrary holding in the case of Riverside Finance Co. v. Griffith, 140 Wash. 322.

§ 69. But a spouse joining in a deed or mortgage of separate property of the other spouse does not affect its separate character: Guye v. Guye, 63 Wash. 340, and Riverside Finance Co. v. Griffith, 140 Wash. 322.

§ 70. **Equitable liens.** In the Rawleigh v. McLeod case, supra, the court draws a distinction between the character of the title to property and an equitable lien thereon for advances, improvements, etc., and in disposing of the contention that it had been held in In re Carmack's Estate, 133 Wash. 374, that a community became part owner of what was separate property by improving it says:

"In speaking of the community interest, the court did not mean title, but was looking to the equities of the case, probably having in mind that, on the death of one of the spouses and the probate of his estate, an equitable lien in favor of the community could be recognized and adjudicated. In the recent case of In re Hart's Estate, supra, the community advances were held to be a gift to the wife, but there is, in that case, no denial of the principle that, if there was no such gift, the community might have, by such advances, acquired an equitable lien."

§ 71. It is true as said in the opinion in Rawleigh v. McLeod, supra, that our supreme court has "said in a long line of cases that the status of real property is fixed as of the time when it was acquired." But it is not an easy matter to determine from this "long line of cases" whether one class of property or interest has a fractional estate in the property or an equitable lien thereon for sums used in its purchase; nor am I able from these decisions to formulate any rule for determining when an equitable lien exists.

On the point as to whether the advancement of part of the purchase price from one class of property or interest creates a fractional interest or an equitable lien let us compare Heintz v. Brown, 46 Wash. 387, with In re Kuhn's Estate, 132 Wash. 678. In the Heintz-Brown case the property was bought on executory contracts, the first payments being made out of the separate funds of the wife and the remainder by moneys advanced on mortgages executed by both members of the community when the deeds were secured for the property, so that the community credit was pledged, and the court held that the property was separate property to the extent that the separate funds were used in the purchase price and community property to the extent that the credit of the community was pledged. In the Kuhn case, property was purchased on an executory contract, the cash payment being made out of community funds. Later one of the members of the community died and thereafter the remainder of the purchase price was paid and a deed secured. It is not specifically stated in the opinion from what funds the remainder of the purchase price was paid. The Heintz-Brown case is not mentioned in the opinion but it is held that the executory contract created no interest in the land in the purchaser in the executory contract and that he had no legal or equitable title to or interest in the land until the contract had been fully performed; and that the title to the land did not become fixed until the deed was delivered. The court required one-half of the initial payment to be paid the heirs of the deceased member of the community which was in effect though not in name an application of the equitable lien theory.

A reading of the majority and dissenting opinions in the case of Walker v. Fowler, 155 Wash. 631, will satisfy anyone that I am correct in my statement that no definite rules can be formulated from the decisions as to when an equitable lien exists for advancements for improvements, etc.

But one dealing with a title to real property is not concerned with the nature or amount of interest one class of property-interest may have in a piece of land. If one dealing with property has no notice, either actual or constructive, of such interest he is protected: Attebery v. O'Neil, 42 Wash. 487. But, if he has any notice of such an interest, or there is a fair chance that a claim or interest may exist, one dealing with the property will require that the interest be acquired or the property be released from the probability of any such claim.

§ 72. **Deeds in extinguishment of mortgage.**— The question discussed above as to one class of property-interest having an estate or interest in land, the title to which is not held by such class, may arise when title is taken in extinguishment of a mortgage, either by deed from the fee owner or in satisfaction of the mortgage under a sale in foreclosure of such mortgage. If the record shows that title was so acquired it requires no authority to sustain the statement that the title would be separate or community dependent upon whether the mortgage was separate or community, and it would be necessary to determine the marital status of the mortgagee when the mortgage was acquired.

§ 73. **Record showing of character.** We have just seen that the status of property, whether separate or communiyt, becomes fixed at the time of its acquisition. What evidence is required to show the status or character of property? The question generally arises when property is claimed to be the separate property of one in whom the record title stands. It must be remembered that all property acquired by a married person for a valuable consideration is presumed to be community property: Yesler v. Hochstettler, 4 Wash. 349; Dormitzer v. German Savings & Loan Society, 23 Wash. 132; Plath v. Mullins, 87 Wash. 403, and Hill v. Cole, 132 Wash. 432; and that the burden of proof is always on the one asserting the separate character of property: Hill v. Young, 7 Wash. 33; Guye v Guye, 63 Wash. 340; Plath v. Mullins, 87 Wash. 403, and In re Brown's Estate, 124 Wash. 273, 276.

§ 74. Suppose an examiner is fully satisfied by proof which would be accepted by a court as sufficient evidence to establish the separate character of the property that the property was the separate property of the grantor thereof and some ten

years after the title is passed, a minor child of the grantor asserts an interest in the property. This minor proves that, at the time the title was acquired, the record owner was his father, that this record owner was then married to the minor's mother and that thereafter his mother died. This minor has made a prima facie case that he is entitled to one-half of the property because the property is presumed to have been the community property of his father and deceased mother. Will the proof of the separate character of the property which has satisfied the examiner ten years theretofore be vailable to overcome in a clear and convincing manner the presumption that the property was community property?

Therefore I say that the only safe course to pursue is to require a record showing of the separate character of property before passing a deed or mortgage executed by the one in whom the record title stands and if this showing is not made then require the one who was the spouse of the holder of the record title at the time the title was acquired to join therein. There are some record showings which are not regarded as sufficient, viz.: affidavits and recitals in deeds; and others which are sufficient. The record showings which are sufficient to establish the separate character of property are, that the property was acquired by inheritance or devise, an award in probate proceedings, a homestead selected from community property, a suit to quiet title, certain lands acquired from the United States government, a deed of gift, a deed from the spouse of the record owner at the time the title was acquired, and contracts between husband and wife as to the status of property. These will be considered in the order stated.

§ 75. **Affidavits.** There is no rule of evidence under which an affidavit as to the status of property would be admitted in a controversy as to whether property was separate or community. There is some justification for admitting an affidavit as to the marital status of one appearing in a chain of title in order to show that one who dealt with the property was a bona fide purchaser. See subhead, **marital status,** infra, § 98. But the rule which might justify an admission of an affidavit as to marital status would not apply where one has knowledge of the marriage relation and was seeking to overcome the presumption of the community character of property. The burden is on the one seeking to establish the separate character of the property by convincing evidence.

§ 76. **Recitals in deeds.** What has been said as to affidavits applies to recitals in deeds. In Mace v. Duffy, 39 Wash. 597, 599, it is said:

> "Such statements [recitals in deeds] are but the ex parte declarations of the persons making them, which

might be evidence against them as admissions in an action to which they were parties, but which can never be admissible as evidence in their favor."

And in In re Murphy's Estate, 46 Wash. 574, it is held that a recital in a deed that the property was the separate property of the grantee does not affect its actual community character.

§ 77. **Trustee.** We sometimes find a deed with the word "trustee" or the words "as trustee" following the name of the grantee and nothing in the deed or of record to show the nature of the trust. If the grantee was married at the time of the acquiring of the title, is a deed from him signed and acknowledged "trustee" or "as trustee" as the same was written in the deed by which he acquired title sufficient without his wife joining therein? I do not think so. If a recital in a deed that the property is the separate property of a grantee is not binding on the community of which such grantee is a member, certainly a statement that the grantee is a trustee without disclosing the nature of the trust is not binding on such community. I have known of cases where men endeavored to deal in real estate by the use of these words without their wives knowing of the transactions. I recall particularly one case where I had asked whether the grantee was married and on ascertaining that he was, asked that his wife join in the deed. The man said in substance, "Why, that's not necessary. I've taken this title as trustee. The purpose of my so doing was to avoid the necessity of my wife joining in the deed. I have had many similar transactions without the question being raised before."

§ 78. **Devise and inheritance.** No comment is needed as to property acquired by either devise or inheritance. The statute makes property so acquired separate property.

§ 79. **Awards.** The award in probate proceeding to the surviving spouse is the separate property of the one to whom it is awarded: Greer v. Robinson, 149 Wash. 659.

§ 80. **Homestead.** Section 561 of Rem. Rev. Stat. provides that if the selection of a homestead "was made by a married person from the community property, the land, on the death of either of the spouses, vests in the survivor, subject to no other liability than such as exists or has been created under the provisions of this chapter," which is the chapter of the law on Homesteads.

The language is clear that if the selection is made by a

married person from community property on death of either member of the community the title to the homestead property vests in the survivor, and is his or her separate property. The supreme court holds that this right to select a homestead from community property may be exercised after the death of one member of the community with the same result as to the vesting of the title as if the declaration had been filed during the existence of the community. See a full discussion in Stewart v. Fitzsimmons, 86 Wash. 55; also Moyses v. Nyboe, 90 Wash. 257.

The vital fact to determine then is whether the property was the community property of the one claiming it and his or her deceased spouse and that the declaration is in due form and the declarant was entitled to a homestead.

§ 81. **Court proceedings.** A valid and final decree in a suit to quiet the title to specific land as separate property is, of course, binding on all those who are parties thereto and properly served with process.

§ 82. **Divorce proceedings.** In actions for divorce, it is frequently stated in both complaint and decree that there is no community property. Reliance cannot be placed on such finding to make any property standing in the name of either of the parties the separate property of the record owner: Barkley v. American Savings Bank & Trust Co., 61 Wash. 145.

It is suggested that the following principles are established by decisions of our supreme court:

1. Where the property of the parties is not brought before the court in the pleadings, the court has no jurisdiction to make disposition of it; 2. Upon divorce, where there is no disposition of property, the separate property of the spouses retains its separate character and the community property becomes common property; 3. Allegations or findings that there is no community property are of no effect; 4. A decree making no disposition of the property does not set in motion the statute of limitations; and, 5. The interlocutory decree of divorce adjudicates property rights but such adjudication does not become final nor the property rights of the parties become fixed until the final decree dissolving the bonds of matrimony is entered.

See, Webster v. Webster, 2 Wash. 417; Philbrick v. Andrews, 8 Wash. 7; Goore v. Goore, 24 Wash. 139; Ambrose v. Moore, 46 Wash. 463; Graves v. Graves, 48 Wash. 664; Carpenter v. Brackett, 57 Wash. 460; Barkley v. American Savings

Bank and Trust Co., 61 Wash. 415; Hicks v. Hicks, 69 Wash. 627; Harvey v. Pocock, 92 Wash. 625; In re Martin's Estate, 127 Wash. 44, and In re McCorkle's Estate, 128 Wash. 556. Compare Waugh v. Waugh, 137 Wash. 7, with In re Martin's Estate, supra.

§ 83. **U. S. Lands.** Lands acquired under the Stone and Timber Act (James v. James, 51 Wash. 60) and coal land entries and mining claims (Guye v. Guye, 63 Wash. 340) are separate property because of the peculiar conditions of the acts under which these rights may be acquired. Property acquired under the United States Homestead Act is separate property unless the patentee is also the entryman and such entryman-patentee was married continuously from the time of making entry until the time of making final proof. Where the one who makes final proof under the United States Homestead Act is the same as the one who made entry and such person was married at the time of the making of entry and has the same spouse at the time of making final proof, the land is community property. In all other cases it is separate property of the person or persons to whom the title passes from the U. S. Government. See Teynor v. Heible, 74 Wash. 222, where this question is fully discussed and practically all the cases cited and rules established to conform to the decisions on this question of the U. S. Supreme Court.

An Indian allottee's right under a U. S. patent with restrictions as to alienation is the separate property of the patentee: In re Little Joe's Est., 165 Wash. 628.

§ 84. **Gift deeds.** There is a statutory provision that property of a married person "acquired by gift" is his or her separate property. If a valuable consideration—money or property—is named in a deed to a married person, the presumption is that the property is community property and its separate character would have to be established by clear and convincing evidence. But if a deed shows on its face a relation between the parties justifying love and affection between them, and love and affection is named as the consideration, there is a presumption that the property is the separate property of the grantee. The relation of the parties should be shown or doubt may be cast on the sufficiency of the consideration. If a mother is deeding to her daughter, love and affection is sufficient, but if John Smith is deeding to George Jones, there is nothing on the face of the instrument to indicate that there is any love and affection between the parties thereto. I, therefore, recommend that where the consideration is love and affection, that the relation of the grantor to the grantee be stated, and the relation of the grantee to the grantor. For instance, if Mary Jones were deeding to her daughter, Susan, I would write the

grantor, "Mary Jones, mother of the grantee," and the grantee, "Susan Jones, daughter of the grantor."

§ 85. But may reliance be placed on such presumption and the deed accepted without investigation? I do not have in mind the question of rights of creditors of the community but only the right of the grantee's spouse, or his or her heirs and devisees, to dispute the separate character of the property.

The only case by our supreme court having any bearing on this question is In re Murphy's Estate, 46 Wash. 574, in which it was held that a recital in a deed to a husband to the effect that the land was his separate property was not binding upon the wife when she was not aware of the recital. Would not the same reasoning apply to the naming of a consideration in a deed in an endeavor to make the property conveyed the separate property of the grantee?

In my opinion, the recital in a deed of love and affection as the consideration cannot be accepted as sufficient of itself to establish the separate character of the property conveyed by such deed unless such deed has been of record and unquestioned for some years.

§ 86. **Deeds between spouses.** Provision was made by the legislature of 1888 (Rem. Rev. Stat. § 10572) that one spouse may deed to the other his or her interest in community property and that every such deed vests such property in the grantee as his or her separate property. This statute provides that the deed be signed, **sealed** and acknowledged. At the same time this act was passed, another act (Rem. Rev. Stat. § 10556) was passed abolishing private seals.

The act abolishing private seals was amended in 1923 (Laws of '23, p. 50) to include "deeds from a husband to his wife and from a wife to her husband for their respective community real property," and validated all such deeds theretofore executed. This law is sufficient to make good all deeds thereafter executed by husband or wife to convert community property into separate property of the grantee spouse and the validity of the curative statute as to prior deeds is supported by a long list of decisions of our supreme court. See Skellinger v. Smith, 1 Wash. Ter. 370; Kenyon v. Knipe, 2 Wash. Ter. 422; Graetz v. McKenzie, 3 Wash. 194; Carson v. Thompson, 10 Wash. 295; Spring Water Co. v. Monroe, 55 wash. 195; State ex rel Bussell v. Abraham, 64 Wash. 621, and Maxwell v. Lancaster, 81 Wash. 602.

§ 87. In Norman v. Levenhagen, 142 Wash. 372, it is held that—

> "An executory contract for the purchase of real estate by a community, being personal property, the hus-

band's quit claim in good faith of the community interest to his wife, before any judgment lien is secured by a community creditor, makes it her separate property which such creditor cannot follow."

§ 88. **Caution.** (a) It is not safe to rely on every deed between husband and wife as evidence to make the property the separate property of the grantee spouse. Whenever more than a few days elapse between the date of the execution and the date of the filing of such a deed, the property should not be passed as the separate property of the grantee spouse unless there is proof positive that the deed was actually delivered before the death of the grantor spouse. See for a full discussion of this question the subhead, **Mutual Deeds,** § 102, under this topic.

(b) There is no authority in the law for a deed of community property from husband to wife or from wife to husband to be executed by an attorney-in-fact. Rem. Rev. Stat. § 10575, specifies the things an attorney-in-fact for one of the spouses may do with respect to community property and a conveyance from one spouse to the other is not included in the list.

§ 89. **Contracts as to status.** In the earlier years of my practice of law I questioned the validity of a contract between husband and wife by which they agreed that property acquired by the future earnings of either should be his or her separate property. The reason for this doubt was that I thought our court might, and it seemed to me should, hold that to sustain such a contract would allow two persons to annul the policy of our law with respect to community property. But I now think the decisions of our supreme court rendered subsequent to the time when that opinion was entertained have settled the law to be that husband and wife may by contract change the character of their property, present and prospective.

§ 90. There are three angles from which such contracts are to be considered: 1, rights of creditors; 2, controversies between the parties, their heirs and devisees; and 3, its sufficiency to pass a title based thereon. This discussion is confined to the sufficiency of such a contract to pass a title based thereon, except only as the other phases may be incident thereto. I have tried to classify and reconcile the decisions of our supreme court bearing on this question and the result is given below.

§ 91. Such agreements affecting existing property are not enforceable against creditors of the community at the time

the agreement is made: Marsh v. Fisher, 69 Wash. 570, and Union Savings & Trust Co. v. Manney, 101 Wash. 274.

Nor is a deed of community property from one spouse to the other effective as to creditors of the community and those having "existing equities" against the community at the time the deed is made: U. S. Fidelity and Guaranty Co. v. Alloway, 173 Wash. 404, and Sallaske v. Fletcher, 73 Wash. 593.

Such an agreement is not effective as to subsequent creditors when they had no knowledge of the agreement and the parties continue to live together as husband and wife: Marsh v. Fisher, 69 Wash. 570.

§ 92. Husband and wife may make an agreement changing the character of their community property which will be binding on themselves, their heirs and devisees: Union Securities Co. v. Smith, 93 Wash. 115, and Lanigan v. Miles, 102 Wash. 82, and cases cited.

And husband and wife may make a valid agreement changing separate property of either or both into community property: Valz v. Zang, 113 Wash. 378.

§ 93. **Evidence of contracts as to status.** In Koontz v. Koontz, 83 Wash. 180, it was held that an agreement between a man and woman concerning the status of their earnings after marriage was not valid unless it was in writing, because the statute of frauds requires an agreement made in consideration of marriage to be in writing and that such an agreement was "in consideration of marriage."

When property has vested in a marital community nothing short of a deed will change its character. Such is the holding of our court in Carpenter v. Brackett, 57 Wash. 460, where it is said:

> "Conceding, as the court below found, that on June 2 it was the purpose and intention of appellant to convey these lots to respondent and invest her with the title as her separate estate, he could not do so by handing the deed over to her. The only way his interest in those lots could be vested in respondent was by deed from him to her. It could not be done by intention, purpose, or desire, however strongly he may have expressed himself."

And in In re Sanderson's Estate, 118 Wash. 250, it is said:

> "We said in the case of In re Deschamps' Estate, 77 Wash. 514, 137 Pac. 1009, that the status of property is fixed at the time of its purchase, and remains so fixed

unless changed by deed, by due process of law, or by the working of some form of estoppel."

As to future earnings of a husband and wife an agreement clearly established that they shall be the separate property of the one who earned them, is good as to every one except creditors or third parties: Union Securities Co. v. Smith, 93 Wash. 115, and Lanigan v. Miles, 102 Wash. 82.

§ 94. Conceding the sufficiency of such an agreement, must it be in writing; and if so, what should be the form of the writing? It certainly would not be safe to pass a title dependent on such an agreement unless it was in writing. While our supreme court has recognized in the two cases just cited the sufficiency of a verbal agreement between husband and wife as to their future earnings where rights of creditors or third parties are not involved, if the agreement was questioned years after a conveyance was relied upon which was made in pursuance of such agreement, the witnesses who could establish the agreement may have died or their whereabouts be unknown, or if they were available their memory of the transaction might not be depended upon. So that it is not safe to rely upon such an agreement unless it is in writing.

§ 95. Next, what shall be the form of the writing? If clear and explicit no particular form is necessary, but unless the original agreement can be passed from seller to purchaser as the title is conveyed, the agreement should be in such form that it is in legal effect a deed, so that it may be recorded and a certified copy be admissible as evidence. It must be remembered that certified copies of a recorded instrument are only admissible in evidence if there is a statute authorizing or requiring such instrument to be recorded, and there is no statute authorizing or requiring the class of agreements under consideration to be recorded; but if the agreement was in legal effect a deed it would be entitled to record, and a certified copy would be admissible in evidence.

§ 96. **Contracts effective on death.** The statute provides for husband and wife entering into an agreement with respect to the devolution of community property on the death of either. This statute (Rem. Rev. Stat. § 6894) is sustained in McKnight v. McDonald, 34 Wash. 98, but when the title is sought to be passed under such a community property agreement there remain three unsettled questions, viz:

1. Was the property community property or separate property? If it was separate property the statute does not

apply because it provides only for such agreements as to community property;

2. Rights of creditors: The statute says "that such agreement shall not derogate from the rights of creditors." The meaning of this provision has not been defined by our supreme court. Many lawyers are of the opinion that creditors of a community have a lien on community property until six years elapse after the death of one of the members thereof.

3. Inheritance tax: Property passing under a community property agreement is always burdened with at least a presumptive lien in favor of the state for an inheritance tax against which no statute of limitations runs.

§ 97. **No record showing of character.** Where there is no satisfactory record showing that property acquired by a person when married is his or her separate property then it is presumed to be community property. It does no harm to repeat that all property standing in the name of a married person, whether man or woman, is presumed to be community property: Yesler v. Hochstettler, 4 Wash. 349; Dormitzer v. German Savings & Loan Society, 23 Wash. 132; Plath v. Mullins, 87 Wash. 403, and Hill v. Cole, 132 Wash. 432; and that the burden of proof is always on the one asserting the separate character of property: Hill v. Young, 7 Wash. 33; Guye v. Guye, 63 Wash. 340; Plath v. Mullins, supra, and In re Brown's Estate, 124 Wash. 273, 276.

Such being the law, the only safe course for the examiner of a title to pursue where there is not a satisfactory record showing of the separate character of the property is to ascertain the marital status of the record holder at the time the title was acquired and, if married, to see that the transfer by which his or her title was sought to be passed, was made by the one who held the record title and his or her spouse at the time the title was acquired and, if any such record owner or his or her spouse died during such record ownership, to see that there is a judicial determination of heirship of such deceased person and deeds by the heirs or devisees of such deceased person as well as a deed by the surviving spouse of such deceased person.

§ 98. **Marital status.** When there is not sufficient showing by the records that the land is the separate property of the person in whose name the record title stands, how is the marital status of such person to be determined? It is the custom to accept as a sufficient showing of the fact of marital status the recital in instruments or an affidavit in regard thereto.

Our supreme court recognizes this custom in the case of Singer v. Guy Investment Co., 60 Wash. 674, 679, where the court says:

> "Finally, it is contended that the abstract of title does not show whether a certain grantee in the chain of title was married or single when she acquired the property. There are two answers to this contention. First, we think the evidence was supplied in the form of the affidavit of the party that she was a widow when she acquired the title and that as such she conveyed it. The learned trial court in passing on this objection to the title, aptly observed that 'her statement under oath, that she was a widow at the time she obtained title to the property would certainly be as binding as the mere recitation in the deed to that effect.'"

I have often wondered what theory a trial lawyer would urge as a justification for the court admitting in evidence such recital or affidavit. The question would be apt to arise in a case where a minor child of the grantor was claiming an interest in property as the heir of a deceased spouse of such grantor. Recitals in deeds are accepted as original evidence against strangers when such deed is old enough to come within the classification of ancient documents, which are documents thirty or more years old: 10 Ruling Case Law 1097, Note 6. Sixteen years were held insufficient in the case of Lohse v. Burch, 42 Wash. 156. See also Mace v. Duffy, 39 Wash. 597. Our court refuses to accept affidavits as sufficient proof of heirship: Watson v. Boyle, 55 Wash. 141, and Crosby v. Wynkoop, 56 Wash. 475. I frequently think that the custom of accepting recitals in deeds and affidavits as evidence of marital status has grown out of the exigency of the title situation in the state. If we adhered to the rules of evidence for establishing marital status in chains of title, there would be an effective embargo placed on the transfer of land in the state of Washington.

I justify, to my own satisfaction, the acceptance of recitals and affidavits as to marital status upon the ground that they tend to show bona fides on the part of a purchaser so as to work an estoppel against one claiming an interest in the property based on a state of facts contrary to the recital or affidavit. Rem. Rev. Stat. § 10577 provides:

> "Whenever any person, married or single, having in his or her name the legal title of record to any real estate, shall sell or dispose of the same to an actual bona fide purchaser, a deed of such real estate from the person hold-

> ing such legal record title to such actual bona fide purchaser shall be sufficient to convey to, and vest in, such purchaser the full legal and equitable title to such real estate free and clear of any and all claims of any and all persons whatsoever not appearing of record in the auditor's office of the county in which such real estate is situated."

In Sengfelder v. Hill, 21 Wash. 371, it is held that the term "bona fide purchaser" as used in this statute means one who is "without notice or knowledge of an outstanding superior title." In Dane v. Daniel, 23 Wash. 379, the court holds that the failure of a spouse to file notice of his or her claim in community property held in the name of the other spouse does not estop such spouse from claiming an interest in the property except as against a bona fide purchaser who is one without knowledge of the existence of the marriage relation or who could not, with the exercise of reasonable diligence, obtain such knowledge.

§ 99. **Estoppel.** In a number of cases, our supreme court has held that the spouse who did not file a claim of community interest was estopped, as were those claiming under him or her, from asserting a right in property which had been transferred by the spouse in whose name the record title stood because the purchaser from such record holder was a bona fide purchaser. See the cases of Sadler v. Niesz, 5 Wash. 182; Nuhn v. Miller, 5 Wash. 405; Hayden v. Zerbst, 49 Wash. 103; Daly v. Rizzutto, 59 Wash. 62, and Magee v. Risley, 82 Wash. 178.

When one has read the opinions in these cases and those in the Sengfelder-Hill and Dane-Daniel cases and Attebery v. O'Neil, 42 Wash. 487, he is in full accord with the following statement by Judge Chadwick in the Daly-Rizzutto case, viz:

> "While the result of that case [Sadler v. Neisz, supra] is certain, the ground upon which the decision should properly be made to rest has been the subject of debate and controversy by the bar, and the occasion of much doubt on the part of the courts. The question has been put to this court in subsequent cases, but it being possible to decide the particular case on other grounds, it has not been answered. It is sufficient to say that, up to this time, no absolute rule has been laid down by this court, but each case has been met by reference to its own facts."

But the common ground for the decisions in all these cases is the fact that the purchaser from the person in whose name the record title stood had made sufficient inquiry as to

the marital status of such record owner to give such purchaser the protection of § 10577 of Rem. Rev. Stat. as a bona fide purchaser and that the spouse of the person in whose name the record title stood and those claiming under such spouse were estopped, by his or her lack of action, from asserting a claim to the property.

The justification, then, for the custom of accepting affidavits and recitals as to marital status which would support the introduction of such recitals and affidavits in evidence in a contest with a stranger would be that they tend to support the bona fides of the purchaser from the person in whose name the record title stood.

§ 100. Of course, one cannot safely accept such a recital and close his eyes to all other facts or circumstances which might lead to knowledge of a fact contrary to a recital which was the case in Adams v. Black, 6 Wash. 528, when the deed stated that the grantor was a single man, yet the fact was that he was married, living with his wife and slight inquiry would have revealed that fact.

§ 101. **Recital of single and married:** If we accept the words "bachelor" and "spinster" as a sufficient recital of marital status, I question the propriety of accepting the words "single" and "unmarried" at the time the record owner deeds out to show that he or she was single and unmarried at the time the title was acquired. Each term expresses the marital status at the time of the execution of the instrument but leaves uncertain the marital status at the time the title was acquired. The terms "spinster" and "bachelor" have definite meanings, but the terms "single" and "unmarried" apparently lack this definiteness. Our supreme court has not passed directly on the meaning of the terms "single" and "unmarried." In Muller v. Balke, 47 N. E. 355, the court says of the term "unmarried":

> "Its primary meaning is never having been married, but the term is of flexible meaning and slight circumstances, no doubt, will be sufficient to give the word its other meaning of not having a husband or wife at the time in question."

In the New York case of Re. Kauffman, 15 L.R.A. 292, it was held that a statute providing that a will made by an unmarried woman should be revoked by her subsequent marriage applied to a woman who was a widow at the time of making the will. "The unmarried woman of the statute is a woman not in a state of marriage."

In Conway's Estate, 181 Pa. St. 159, where the testator gave his residuary estate to his "spinster or unmarried nieces" it was held that it included his widowed nieces, as well as those who had never been married.

§ 102. **Mutual deeds.** It has been the common practice in this state for many years past for a man and wife to execute simultaneously separate deeds of their community property, the husband conveying the property to his wife by his deed and the wife to her husband by her deed in anticipation of death, with the understanding that, upon the death of either, the deed wherein the deceased is grantee is to be destroyed and the deed wherein the deceased is grantor is to be filed. The supreme court has twice held in most emphatic language that such deeds are ineffectual for any purpose: Eves v. Roberts, 96 Wash. 99, and Bloor v. Bloor, 105 Wash. 110. In the latter case it is said that such deeds "negative one another, for they must take effect as of the date they are executed if they are effective at all"; and that "the leaving of such deeds with a third party, the one to become effective and the other a nullity, in the order of time, cannot change the legal effect of the instruments, or give them better standing than if they were executed, delivered and filed for record on the same day."

§ 103. **Separate deeds by spouses.** Our supreme court never has been called upon to pass directly on the question of whether or not the title to community real property can be conveyed by separate deeds of husband and wife. That court has intimated in a number of decisions (Sadler v. Niesz, 5 Wash. 182; Nuhn v. Miller, 5 Wash. 405; Adams v. Black, 6 Wash. 528; Mabie v. Whittaker, 10 Wash. 657, and Daly v. Rizzutto, 59 Wash. 62) that community property can be conveyed only by husband and wife joining in the same deed. In the course of the argument by the judge who wrote the opinion in the case of Ryan v. Ferguson, 3 Wash. 356, 363, it is stated that it requires the joint act of husband and wife to pass title to community real estate.

The statute on the method of conveying community real property reads:

> "The husband has the management and control of the community real property, but he shall not sell, convey or encumber the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed or encumbered, and such deed or other instrument must be acknowledged by him and his wife." Rem. Rev. Stat. § 6893.

To hold that separate deeds are sufficient would do violence to the words of the statute. Besides it is the settled law that the community is indivisible during the continuance of the marriage relation and neither spouse can convey his or her interest in community property. All or none must pass. If a deed of one spouse of his or her interest is ineffectual, if the community interest in property is indivisible during the marriage relation, the conclusion seems irresistible that two invalid, ineffectual deeds do not make a good conveyance and that community property can only be conveyed by husband and wife joining in the same instrument. In all cases where the supreme court has held that the deed of one spouse passes the community interest, it does so by enforcing the rule of equitable estoppel as to the other spouse. See Sadler v. Niesz, 5 Wash. 182; Nuhn v. Miller, 5 Wash. 405; Adams v. Black, 6 Wash. 528, and Daly v. Rizzutto, 59 Wash. 62.

CONDITIONAL SALE CONTRACTS

See EXECUTORY CONTRACTS

CONSIDERATION

See DEEDS, § 116, et seq.; MORTGAGES, § 233

CORPORATIONS

§ 104. **Right of domestic corporation to hold land.** In Milton v. Crawford, 65 Wash. 145, 151, it is said:

> "Among the express powers conferred upon domestic corporations by statute (Rem. & Bal. Code, 3683), is the power to purchase, hold, mortgage, sell and convey real estate. In the absence of a plain abdication thereof in the articles of incorporation, this power is inherent in every corporation organized under our general law, just as are the powers to sue and to appoint officers and agents conferred by the same section."

§ 105. **Foreign corporations.** A foreign corporation may hold land in the state only by complying with the statutory

provisions but no one other than the state may raise the question: Latshaw v. Western Townsite Co., 91 Wash. 575.

§ 106. **Stricken corporations.** Where a corporation has been stricken from the records of the Secretary of State and it would not therefore be permitted to maintain an action, it can nevertheless be sued and defend. So long as a corporation may reinstate itself it is not dead, and is, therefore, subject to process and suit: State ex rel Bowen v. Superior Court, 135 Wash. 315; Hayes v. Central Business Property Co., 140 Wash. 596, and Globe Construction Co. v. Yost, 173 Wash. 522.

The syllabus of Patterson v. Ford, 167 Wash. 121, reads:

> "Having acquired a legal corporate existence, a corporation does not cease to be a corporation **de facto,** and is not prevented from acquiring and transferring real estate, by the fact that its name has been stricken from the records in the secretary of state's office for failure to pay its annual license fee, where there has been no adjudication of forfeiture."

COURTS

(See also, PROBATE PROCEEDINGS)

JURISDICTION BY PUBLISHED SUMMONS

§ 107. **Return of not found.** A sheriff's return of "not found" as to a defendant, is but prima facie and is not conclusive: Northwestern & P. H. Bank v. Ridpath, 29 Wash. 687, 702.

A judgment is not void because the return of the sheriff to the effect that the defendant could not be found in the county bears a date prior to the commencement of the action. The court in Allen v. Peterson, 38 Wash. 399, 604, says:

> "Aside from the fact that this is obviously an error on the part of the sheriff, it is not essential to the validity of a service by publication that there be a sheriff's return

to the effect that the defendant cannot be found in the county in which the action is brought. An affidavit complying with the statute is sufficient authority upon which to base a publication of summons."

It is held in Olson v. Johns, 56 Wash. 12, that service by publication is not sufficient where, in an attack on the judgment, it was shown that the defendant's name appeared in the city directory; no attempt was made to serve him personally, and no search made for the defendant by either the sheriff or the one making the affidavit; the court saying:

"Taking the notice and summons to the sheriff's office, with an affidavit of nonresidence, and immediately obtaining a return of 'not found,' upon which to predicate substituted service, is not a compliance with the statute."

§ 108. **Affidavit.** The affidavit for publication of a summons must contain all the statements specifically required by the statute, and cannot be aided in this respect by the complaint: Felsinger v. Quinn, 62 Wash. 183; Burns v. Stolze, 111 Wash. 392, and cases cited.

Failure to state in the affidavit that the summons was mailed to a given address, or that the residence of the defendant was unknown, is fatal to the sufficiency thereof and defects cannot be cured by amendments: Lutkens v. Young, 63 Wash. 452.

Lapse of time between date of affidavit and date of publication discussed and lapse of three days held not fatal, but citing a Michigan case holding a lapse of five days to be fatal: Whitney v. Knowlton, 33 Wash. 319, 322.

An affidavit for publishing summons stating that A and B "are absent from the county of Pierce, and that their place of residence is unknown" is not sufficient: State ex rel Boyd v. Superior Court, 6 Wash. 352, 355.

A statement that defendants reside out of the state is a statement of fact and is sufficient: De Corvet v. Dolan, 7 Wash. 365.

An affidavit which states conclusions instead of probative facts is sufficient: Goore v. Goore, 24 Wash. 139, and Mosley v. Donnell, 42 Wash. 518.

The starting of the publication of summons prior to the filing of the affidavit with the clerk of the court, which affidavit had been made, does not render the judgment void so that it can be collaterally attacked: Tilton v. O'Shea, 31 Wash. 513.

§ 109. **Summons.—Newspaper.** Discussion of what constitutes a newspaper to come within the requirements of the

statute: Puget Sound Publishing Co. v. Times Printing Co., 33 Wash. 551, and Warner v. Miner, 41 Wash. 98, 101.

Proof of publication. The proof of publication must be made by a person whose official position with the paper is designated by statute, and proof made by a "cashier" of a newspaper is insufficient: Rockwood v. Turner, 89 Wash. 356.

Time for starting publication. If service is not had on any of the defendants, the first publication of the summons must be within ninety days from date of filing of complaint: Deming Inv. Co. v. Ely, 21 Wash. 102, and Fuhrman v. Power, 43 Wash. 533.

But where there is personal service on one of the defendants it is not necessary to start the publication within ninety days from the date of filing the complaint, but the court suggests that this does not mean that the publication may be indefinitely postponed: Johnston v. Gerry, 34 Wash. 524, 544.

Time for appearance. Direction to defendant "to appear within sixty days after the service of this summons upon you, exclusive of the day of service, and defend this action," etc., is not sufficient, as no definite time for appearance is given: Thompson v. Robbins, 32 Wash. 149; Young v. Droz, 38 Wash. 648; Gould v. Knox, 53 Wash. 248; Hays v. Peavy, 54 Wash. 78, and Pillsbury v Beresford, 58 Wash. 656.

A statement that the defendant is required "to answer within sixty days (after the service of this summons, exclusive of the first publication of summons), which will be on the 6th day of June, 1901, and defend the above entitled action," held insufficient, as the time for appearance was indefinite: Owen v. Owen, 41 Wash. 642.

A summons requiring the defendant to appear within sixty days after a specified date, which date corresponded with the date of the first publication of the summons, but without a statement in the summons that the time specified was the date of first publication, is sufficient: Old Republic Mining Co. v. Ferry County, 69 Wash. 600.

A summons requiring the defendant to appear "within sixty days after the service of this notice and summons upon you, exclusive of the day of service, or within sixty days after the first publication of this notice and summons, exclusive of the day of said first publication, to-wit, within sixty days after the 30th day of June, 1904," held sufficient, although the court says that the practice of requiring appearance in the alternative is not to be commended: Security Savings Society v. Collins, 56 Wash. 455.

A summons requiring the defendant to appear within sixty

days from the date of the first publication, without stating in the body of the summons the date of the first publication, but the date of the first publication being stated just below the attorney's name, held sufficient: Williams v. Pittock, 35 Wash. 271, 279.

But see Bauer v. Widholm, 49 Wash. 310, where it is said, "The date of first publication was stated beneath the signature of the respondent's attorney, but this was not sufficient."

Statement of cause of action. Where a summons by publication in an action for divorce notifies defendant that one of the objects of the action is to procure "the equitable distribution to plaintiff of the property, real and personal, of plaintiff and yourself," it is sufficient to notify the defendant that the disposition of his separate property, as well as that of the community, is contemplated: Goore v. Goore, 24 Wash. 139.

Where the summons describes the note and says that the suit is to foreclose a mortgage securing the note, it is sufficient without particularly describing the mortgage or the property mortgaged: De Corvet v. Dolan, 7 Wash. 365.

DEEDS

§ 110. The only way an interest in real estate can be conveyed is by deed. It cannot be done by "intention, purpose or desire, however strongly expressed:" Carpenter v. Brackett, 57 Wash. 460.

§ 111. **Statutory forms.** Our statutes, §§ 10552, 10553 and 10554, Rem. Rev. Stat., provide three forms of deeds; warranty, bargain and sale and quit claim, and give the force and effect of each. It is well for one who has occasion to use deeds to read these statutes and some of the decisions digested in Remington's Revised Statutes. When the form of warranty deed is used without destroying its effect by modifications it carries full covenants of warrants. The bargain and sale is, in effect, a special warranty deed and the quit claim deed is a conveyance of the then existing "legal and equitable rights of the grantor in the premises therein described." It will be noted that in the form of quit claim deed the grantor conveys **all interest** in the property but does not convey the property. A deed labeled "quit claim" which conveys the property and

not limited to a conveyance of the grantor's interest therein, operates to pass an after-acquired title. Such an instrument is, in effect, a bargain and sale deed: Ankeny v. Clark, 1 Wash. 549. See also West Seattle Land Co. v. Novelty Mill Co., 31 Wash. 435.

It is not well to try to improve on these statutory forms for it is held that where a deed is prepared on a statutory form for a warranty deed but sets out certain particular things which are warranted against, it is not a statutory "warranty deed" with full covenants of warranty: Leddy v. Enos, 6 Wash. 247.

§ 112. **Parties.** The most important item in describing the parties in a deed or mortgage is that the name of the record owner be written in the party clause therein in the same way it appears in the instrument or proceeding by which the record title is acquired.

There is a case in this state where a man came here from the East and adopted an assumed name and did a great deal of buying and selling of real estate under such assumed name. We will say that his assumed name was John Doe while his true name was Richard Roe. A deed executed by Richard Roe, his true name, would not be constructive notice because a searcher of the records would only run the fictitious name, John Doe. If Mary Jones, while single, acquired a piece of property and later married John Smith, the deed by her under the name of Mary Smith would not be constructive notice.

It is the law of this state that a person may take title to property by a fictitious name: Chapman v. Tyson, 39 Wash. 523. I recommend that where the name of the person taking property has been changed before deeding or mortgaging, or the title was acquired by the name being misspelled, that in a deed or mortgage, the name be first given in the party clause as the title was acquired. For instance, if a deed should run to the writer hereof as W. H. Winnifree, and I was deeding or mortgaging the property, I recommend it being written, W. H. Winnifree whose true name is W. H. Winfree, or if Mary Jones acquired property and later married John Smith and he was to join with her in the deed, that the names in the party clause be written, Mary Jones who is now Mary Smith, and her husband, John Smith.

The reason I recommend that the name be first written in the party clause of the deed or mortgage in the same way it is spelled in the deed by which it was acquired, is that the auditor is reasonably certain to index the instrument by the first name, but might overlook indexing by the second name and indexing is an essential part of the recording in order to give constructive notice: Ritchie v. Griffiths, 1 Wash.

429; Dunsmuir v. Port Angeles etc. Co., 24 Wash. 104, and Bernard v. Benson, 58 Wash. 191.

In making the foregoing statement, I am not unmindful of some of the expressions found in the opinion in the case of Pioneer Sand and Gravel Company v. Seattle Construction and Dry Dock Company, 102 Wash. 608.

§ 113. Everyone in any way familiar with real estate titles in this state knows that we have what is called community property. Under this law all property acquired by a married person during his or her marriage relation is presumed to be community property and that is so regardless of whether it appears from the records that such person is married. It is therefore highly desirable that the marital status of a grantee in a deed be given. I recommend that if the title is to be taken by John Smith whose wife is Mary that he be named as grantee as follows: John Smith (whose wife is Mary Smith).

If all deeds of property in this state had been drawn as just recommended, there would be very little occasion for affidavits as to the marital status of the parties in a chain of title. Because of the fact that there are so few deeds which give the marital status of the grantee, it is recommended that where the grantor is a bachelor or spinster, that that term be used. If he or she has been married but was not in a state of marriage at the time the title was acquired, I recommend that after naming the grantor, there be written, "Unmarried at the time of acquiring the title." If the grantor was married at the time of acquiring title, then after naming the parties, say, "Husband and wife at all times since a date prior to the acquisition of title."

§ 114. **Lodgment for title.** It is the law that the title to land must always have a home, a place of lodgment, and that those in whom the title has its home at the time of the execution of a deed must be named in the party clause thereof and be executed by those so named therein or on their behalf by one having authority so to do.

It is also the law that a deed, to be effective, must have a grantee who is capable of taking the title and furnishing a home therefor. One may be qualified to take and hold a title and yet not qualified to convey or encumber such title. This is the case with infants and insane persons. Any individual person "in being" is, and most corporations are, capable of taking and holding the title to real estate, but not all are qualified to convey or encumber such title. A dead person is not capable of taking title and if one who was named as grantee has died before the deed is delivered, no title passes by such deed. It might be thought that the heirs of such per-

son would take but that is not the law. Some corporations are not capable of taking or holding property and under some conditions, a corporation capable of taking and holding is incapable of deeding or disposing of it.

§ 115. **Grantee in blank.** There is a holding of our supreme court which is somewhat in conflict with the statement that a deed to be effective must have a grantee capable of taking and holding title to the property described therein. Our court holds in Clemmons v. McGeer, 63 Wash. 446, that the execution and delivery of a deed without a grantee being named, with authority to the party to whom it is intrusted to fill in the name of the grantee will vest title in such grantee, and this rule is recognized in Wright v. Heyting, 118 Wash. 436. In the latter case, it is questioned whether the one to whom the grantor gives the authority may extend it to someone else.

If the person to whom the deed is executed and delivered with no grantee's name written therein is really the purchaser of the property, it would, if the person were married, become the community property of such purchaser and his wife and the filling in of the name of another as grantee would deprive the wife of such purchaser of her community interest. Therefore, it would seem that her consent would be necessary to such filling in of a name so as to bar her right in the property.

§ 116. **Consideration.** There is no subject concerning which there is more misunderstanding than that of what constitutes a consideration in a contract or deed. Almost everyone knows that any form of contract, which includes a deed, must have a consideration, and most people think that the consideration must be expressed in dollars.

The courts define consideration to be anything that is a benefit to the one who makes the promise, or anything that is a detriment to the one to whom the promise is made. In Ruling Case Law under the subject of contracts, it is said:

> "A long series of decisions has established the rule that a benefit to the promisor or a detriment to the promisee is a sufficient consideration for a contract. Stated with greater elaboration, a valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other."

Except in cases of fraud or overreaching, the courts will not weigh the sufficiency of a consideration where the party is competent to transact business. In other words, the law will enforce a contract except in the case of fraud.

Where a consideration is a monetary one it is well, but not necessary, to set forth the actual amount thereof. In cases where the parties to a transaction do not wish to disclose to the public the actual consideration involved it may be expressed as one or any number of dollars.

Consideration need not necessarily be money or property, and it is a mistake to recite as a consideration a sum of money such as one dollar or ten dollars when there is no monetary consideration. For instance, where a parent wishes to give property to a child the actual consideration is love and affection and should be so recited for the reason that it will then show on the face of the conveyance that it is a gift and the separate property of the grantee. If money is stated to be the consideration and the grantee is married at the time of the conveyance, the property is presumed to be community property.

§ 117. **Nominal consideration.** It is customary to name a nominal, and not the real, consideration in a deed. There is a rule of law that neither of the parties to a valid written contract can vary, add to or contradict its terms by parol proof. Let us assume the case of a purchaser of a piece of property for $1000 in cash conveyed by warranty deed with an expressed consideration of $10. The title fails and the purchaser sues the seller under his covenant of warranty. Does the rule of law as to varying the terms of a written contract limit the purchaser to $10 as damages, or can he prove by parol testimony that he paid $1000 in cash for the property, so that he can recover that amount as his damages? This specific question never has been before our supreme court, but there are many cases holding parol proof admissible on analogous facts, so it may be safely said that the true consideration might be shown in the assumed case. See Van Lehn v. Morse, 16 Wash. 219; Wright v. Stewart, 19 Wash. 179; Williams v. Blumenthal, 27 Wash. 24; Roberts v. Stiltner, 101 Wash. 397, and In re Tveekrem's Estate, 169 Wash. 468.

The general rule of law on this question is stated in 8 Ruling Case Law, p. 971, § 43, as follows:

> "By the weight of American decisions the recital of the consideration even as between the immediate parties comes down to the rank of prima facie evidence, except for the purpose of giving effect to the operative words of the conveyance. Therefore, while a consideration duly acknowledged cannot be contradicted by parol for the purpose of destroying the legal effect of the deed as a conveyance, the only effect of the consideration clause is to estop the grantor from alleging that it was executed without consideration, and to prevent a resulting trust in the grantor, and while, in the absence of fraud, the grantor

is not permitted, for the purpose of defeating the operation of the deed, to show that there was not a consideration of money paid, for any other purpose he may show the true consideration. In other words, the fact and manner of payment may be shown by parol."

§ 118. While the general rule is as set out above, the method of stating the consideration in a deed may be such that parol proof will not be admitted to vary, modify or explain the stated consideration. Nor as a general rule, can the consideration in a mortgage be varied by parol proof.

In Union Machinery & Supply Company v. Darnell, 89 Wash. 226, the court holds "that an instrument purporting to be a mortgage, complete upon its face and unambiguous as to the amount and character of the debt secured," is not subject to variation, extension or contradiction by parol evidence. The court makes reference to instances when the stated consideration in a deed may not be varied, and its reasoning is so forceful that one interested in this question will do well to read the opinion.

§ 119. **Adequacy of nominal consideration.** Only creditors can raise the question of the adequacy of a consideration. The grantor in a deed cannot destroy its effect by showing that there was no consideration except in the case of fraud, accident or mistake. In Gardner v. Herbert, 165 Wash. 429, 432, it is said:

> "It is also maintained that there was a want of consideration to respondent for signing the deed. This deed contained an allegation that it was executed for a valuable consideration. In 4 R. C. L. 500, the rule is announced:
>
> > " 'Want of consideration, in the absence of fraud. accident, or mistake, is not a ground for cancelling a deed, especially where the instrument contains a recital that the conveyance is made for a valuable consideration, such recital being deemed to effect an estoppel as against the grantor.'
>
> "We conclude, therefore, that the respondent did knowingly execute and deliver a valid deed transferring the property in question to appellant."

§ 120. Turning now to the rights of creditors. It is a rule of law that a grossly inadequate consideration for a sale of property is a badge of fraud. When a deed in the chain of title to property recites a nominal consideration, does that fact put one who is dealing with the property on inquiry as to the bona fides of the transaction?

The question never has been squarely answered by our supreme court. In Kinney v. McCall, 57 Wash. 545, 548, in holding that the recital of a nominal consideration in a deed made twelve years before the defendant purchased the property was not notice of an infirmity in the deed, the court said:

> "A person who purchases property for a nominal or grossly inadequate consideration is not a bona fide purchaser, and one who purchases from such a purchaser with notice stands in his shoes; but a purchaser of real property is not bound to compare the consideration recited in every deed in his chain of title with the market value of the property at the time of the several conveyances, under penalty of having the property impressed with a secret trust in his hands. If such a rule were sanctioned by the courts, no person could safely purchase, hold or deal in lands."

The court also in this opinion quotes with approval the following from Babcock v. Collins, 60 Minn. 73, 61 N. W. 1020, 51 Am. St. 503, viz:

> "Conceding, without deciding, that the nominal consideration expressed in it was a sufficient circumstance, for some reasonable time after it was made and recorded, to put a purchaser on inquiry, that time has long since passed."

In Ross v. Kenwood Investment Co., 73 Wash. 131, 141, the court makes this comment on that part of the Kinney-McCall decision just above quoted, viz:

> "This is indeed a just and wholesome doctrine for practical application in this new and growing state, where real property has become the subject of barter, exchange and sale, to an extent, it seems safe to say, which is equalled by comparatively few localities in the world."

§ 121. The custom in this state of naming only a nominal consideration in a deed is so general that it is a rare exception to find the true consideration given. It is highly probably that the court would take judicial notice of this custom. If the question was raised there would be no trouble in showing this general and almost universal custom. Such being the case I am of the opinion that a nominal consideration in a deed does not suggest lack of bona fides in the transaction.

§ 122. **Description.** The purpose of a description is to enable one to locate the property from such description. It is

desirable, but not necessary, that the description of the property as theretofore used be followed.

The rule for determining the sufficiency of a description in a deed is well stated in Sengfelder v. Hill, 21 Wash. 371, 378, as follows:

> "To render a deed void for uncertain description, there must be either a fatal infirmity in the description, appearing on the face of the instrument, or an inability to apply the given description to any particular property. When the objection to the description is made upon the first ground, its sufficiency is determined by an inspection of the deed itself, without ulterior inquiry. But, before a deed will be declared void for the latter reason, all sources of inquiry which the description itself and the circumstances surrounding the parties and the conditions existing at the time of its execution naturally suggest must be exhausted in a vain effort to locate the property."

§ 123. The decisions of our supreme court in regard to real estate brokers' commissions have upset many of the rules as to description. The logical result of the decision of our court in Rogers v. Lippy, 99 Wash. 312, is to hold that an instrument affecting the title to real estate in this state should contain such a description of the property that it can be identified thereby without taking anything more for granted than that the property is located somewhere in the United States. See the collection of decisions of our supreme court on the sufficiency of a description in the case of White v. Panama Lumber & Shingle Co., 129 Wash. 189, 192.

§ 124. In conveying or encumbering a part of an irregular tract or a part of a lot or tract which does not lie true to the compass, it is advisable to describe the property by meets and bounds. If the fraction to be conveyed is what is commonly designated as the east half of such tract, or the east half of a lot which does not lie true to the compass, the parties may find by the use of such fractional portion as the description that the deed does not convey, or the mortgage encumber, the land intended to be conveyed or encumbered.

In the case of Robinson v. Taylor, 68 Wash. 351, it is held that,

> "A deed of the 'north half' of an irregular tract of land (a rectangle less a considerable triangle cut off the northeast corner) conveys an equal half of the area of the tract, and is unambiguous; hence it is inadmissible to explain, by testimony of transactions and conversations prior

to the execution of the deed, the intent of the parties to convey that part of the tract lying north of a line midway between its north and south lines."

In the course of the opinion it is said:

"The case of Owen v. Henderson, 16 Wash. 39, 47 Pac. 215, 58 Am. St. 17, is decisive of the question here involved: In that case it was held that a deed conveying the 'west half' of a fractional lot according to government survey, which contained less than a legal subdivision of forty acres, conveyed an equal half of the lot in area, notwithstanding the addition to the description of the words 'containing twenty acres more or less.'"

§ 125. **Recitals.** The general doctrine is that recitals in the interest of the party making them cannot be accepted as true without proof while those against his interest are considered as having been proven by his admission: 18 Corpus Juris., 264.

In Peterson v. Weist, 48 Wash. 339, our supreme court recognizes the doctrine that recitals of unrecorded encumbrances contained in a deed have practically the same effect, so far as notice is concerned, as recorded encumbrances; therefore, such recited encumbrances cannot be ignored even though in the same instrument it is claimed that the encumbrance has been satisfied. One dealing with the title is bound, not merely by what the instrument says as to the unrecorded encumbrances, but by all the facts concerning them which inquiry might develop.

In the case of Mace v. Duffy, 39 Wash. 597, 599, it is said:

"Such statements [recitals in deeds] are but the ex parte declarations of the persons making them, which might be evidence against them as admissions in an action to which they were parties, but which can never be admissible as evidence in their favor."

The recital in a sheriff's deed that it is issued to the grantee as assignee of the holder of the sheriff's certificate of sale is not binding on persons who are not parties to the deed and it is not evidence that the sheriff was authorized to execute the deed to the assignee as against the holder of the certificate: Prentice v. How, 84 Wash. 136.

Recitals in a deed to a husband to the effect that the land was his separate property, do not affect the community character of the land where it was purchased with community funds and the wife was unaware of the recitals: In re Mur-

phy's Estate, 46 Wash. 574. This subject is further discussed under the subhead, **Marital Status,** § 98, under the topic, COMMUNITY PROPERTY.

§ 126. **Technical phrases control intention.** Parents gave their daughter a tract of land. The deed by which it was conveyed contained the following provision:

> "The above described property to be the individual and separate property of Laura J. Fowler, said property to be vested in her during her lifetime, and at her death to be the property of the heirs of her body. Said property not transferable during her lifetime."

The daughter sold the property and attempted to convey it. After her death her children brought suit to recover it: Fowler v. Wyman, 169 Wash. 307. The plain meaning of the quoted portion of the deed is that the daughter was to have a life estate in the property and on her death it should go to her lineal descendants. But our supreme court held that the intent of the parents did not govern, that the technical terms used in the deed from the parents to the daughter passed the fee title, and that the conveyance from the daughter passed the fee title to her purchaser. I will discuss this case further under the subhead **Estates Tail,** § 151, under the topic ESTATES.

The moral to be learned from this case is that it is most dangerous for one not well versed in the law of real property to attempt to prepare any, except the most simple, deed or instrument affecting the title to real property. Many of the rules governing title to real property have their origin in the feudal system which is a part of the common law. We have adopted the common law as the foundation of our legal structure and the principles of this law govern unless modified by statute.

§ 127. The decision in the Fowler-Wyman case cited above is based on the celebrated "Rule in Shelly's Case" and the principle that restraints on alienation of property are not favored.

The rule in Shelly's case is discussed under the subhead, **Shelly's case, rule in,** § 149, under the topic ESTATES, as is the principle as to **Restraint on alienation,** § 148.

The reason for adhering to such apparently antiquated rules in determining the law of real property is well stated in an opinion from the court of last resort in New Jersey, overruling an opinion by a judge of the supreme court in the case of Adams v. Ross, (N. J.) 82 Am. Dec. 237, 242. It is there said:

"In the administration of the law of real estate, I prefer to * * * maintain the great rules of property, to adopt no new dogma, however convenient it may seem to be. The refined course of reasoning adopted [by the judge whose opinion is overruled] in the face of so great a weight of authority rather shows what the law might have been than what it is.

"I am utterly unprepared to overturn the common law, as understood by Littleton, Coke, Shepherd, Cruise, Blackstone, Kent, and all the judges who have administered it for three centuries, and to adopt the dogma that intention, not expression, is hereafter to be the guide in the construction of deeds. That would be as unwarrantable as dangerous."

§ 128. **Signature.** A signature by an individual, followed by a descriptive word, such as "manager," "president," "agent," etc., is the individual signature of the party and, in the absence of other controlling circumstances, does not bind those whom he represents. Likewise, a deed to a party with such a descriptive word following his name vests the legal title in him in his own right and not in a representative capacity but, as a trust may be created by a separate instrument or imposed by law, it is, in general, advisable that the intended beneficiary join in subsequent instruments executed by the named grantee. An extended discussion of the doctrine of **descriptio personae** is contained in the case of Griffin v. Union S. & T. Co., 86 Wash. 605.

§ 129. **Form of signature.** Under the early law deeds were not signed; they were sealed by the party to be bound pressing his signet ring on warm wax. But, under our statute, it is provided that,

"All conveyances of real estate or of any interest therein, and all contracts creating or evidencing any encumbrance upon real estate shall be by deed."

And that,

"All deeds and voluntary transfers of real estate or any interest therein shall be in writing, signed by the party bound thereby and acknowledged by the party making it before some person authorized by the laws of this state to take acknowledgments of deeds."

§ 130. It is customary to have a deed and mortgage signed in the same way that the parties' names are written in the party clause; that is desirable but not necessary. In Ruling

Case Law, vol. 8, p. 938, the rule with regard to signatures, supported, I believe, by unanimous authority, is stated as follows:

> "A signature may be merely by initials, or by a cross or other mark, or by figures; and that a grantor could read does not invalidate a signature to a deed, affixed by another and attested by his mark; nor is it necessary to use the words, 'his mark' or their equivalent, nor is the instrument invalidated by an error in the name as written, the true signature being the act of marking."

§ 131. If the instrument is executed by an attorney in fact, the principal's name should be signed first, followed by the signature of the attorney in fact. The signature must be so that it will be construed as the act of the principal and not of the agent.

§ 132. **Acknowledgment.** I have discussed most of the essentials of an acknowledgment under that topic. An unacknowledged deed is good as between the parties and conveys an equitable title: Edson v. Knox, 8 Wash. 642; Carson v. Thompson, 10 Wash. 295; Bloomingdale v. Weil, 29 Wash. 611; Matson v. Johnson, 48 Wash. 256, and In re Deaver's Estate, 151 Wash. 454. Section 10599 of Rem. Rev. Stat. provides that a deed which is recorded in the proper auditor's office gives constructive notice although such deed is not properly acknowledged. The case of Rehm v. Reilly, 161 Wash. 418, holds that the recording of a purported copy of a deed is not constructive notice, but I do not think this case militates against the effect of constructive notice as provided by the section of the statute just above referred to.

While an unacknowledged deed which is recorded is sufficient to give constructive notice, yet a certified copy of such a deed would not be admissible in evidence and if it ever became necessary for an owner of the property to deraign his title he would not be able to do so.

§ 133. **Delivery.** A deed is of no effect until delivered. We cannot see, hear or feel that intangible thing called "delivery." It occurs at the instant when a grantor intends to part with, and a grantee to receive, the title. It may be asked how an infant or insane person, each incapable of forming an "intent," may acquire a title by deed. The law is that if a deed is of benefit to a grantee, his intent to receive the title is presumed: Bjmerland v. Eley, 15 Wash. 101. It is said that there must be a present intent to pass the title. The question of whether there has been a delivery generally arises when

a deed is delivered to a third person for the grantee. There are two outstanding cases in this state which fully discuss the decisions and the rules applicable to delivery. They are Showalter v. Spangle, 93 Wash. 326, and Drinkwater v. Hoffeditz, 157 Wash. 305.

The intention to pass the title is a vital requisite of delivery, and where such intention existed there was a delivery, although the deed remained in the possession of the grantor: Thatcher v. Capeca, 75 Wash. 249.

A deed is presumed to have been executed and delivered on the date of its acknowledgment: State v. Dana, 59 Wash. 30.

A recorded deed is presumed to have been delivered. The recording of a deed by the grantor is sufficient delivery to convey title where the conveyance is for the benefit of an infant, and in such case the infant will be presumed to have accepted it: Bjmerland v. Eley, 15 Wash. 101.

See discussion of the subject of presumption of delivery and collection of cases in In re Brickey's Estate, 157 Wash. 532.

An unconditional delivery of a deed in escrow is valid even in case of subsequent death of the grantor: Showalter v. Spangle, 93 Wash. 326.

Delivery of deed in escrow to be effectual must be unconditional: Drinkwater v. Hoffeditz, 157 Wash. 305.

§ 134. **Alteration after delivery.** When a deed has been delivered, any change or alteration in the deed has no effect on the grantee's title: Egstrom v. Peterson, 107 Wash. 523.

DESCENT AND DISTRIBUTION

See also, PROBATE PROCEEDINGS

§ 135. Upon the death of an owner of real estate, his or her title vests immediately in his or her heirs or devisees subject to expenses of administration, award in lieu of homestead, family allowances, debts, inheritance taxes and other charges for which such real estate is liable: Rem. Rev. Stat. § 1366, and cases cited, particularly the leading case of Griffin v. Warburton, 23 Wash. 231.

Of course, the devisees are not ascertained until the will is admitted to probate and, until a will is admitted to probate,

the presumption is that the title passes to heirs. Rem. Rev. Stat. § 1366.

§ 136. **Adopted child.** An adopted child is a descendant: In re Waddell's Estate, 131 Wash. 566, and In re Hebb's Estate, 134 Wash. 424.

An adopted child may inherit both from his adoptive parent and his natural parent: In re Roderick's Estate, 158 Wash. 377.

DIVORCE

See also, COMMUNTY PROPERTY, § 82

§ 137. The settlement of property rights in an interlocutory decree is not final. The death of either party before entry of final decree cancels the interlocutory decree: In re Martin's Estate, 127 Wash. 44; In re Chisholm's Estate, 159 Wash. 674, and In re Madden's Estate, 76 Wash. Dec. 1.

But it does not seem to be necessary that the final decree confirm the property settlement provided for in the interlocutory decree. The syllabus to Waugh v. Waugh, 137 Wash. 7, reads:

> "An interlocutory decree of divorce awarding monthly alimony is final in that respect, although it was not confirmed as required by Rem. Comp. Stat., § 988-1, by the final decree, which merely granted a divorce; in view of Id., § 988, which requires the interlocutory decree to make all necessary provisions for alimony, costs, custody, division of property and support, and provides that the same shall be final as to the 'custody, management and division of property.' "

§ 138. A decree of divorce awarding alimony in installment payments is a final judgment as to any accrued installments: Boudwin v. Boudwin, 159 Wash. 262.

EASEMENTS

§ 139. The syllabus of Van Buren v. Trumbull, 92 Wash. 691, reads:

> "Since the dedicator of a plat selling lands abutting on a dedicated street cannot defeat the grantee's rights to an easement in the street, common grantees claiming through him cannot, as between themselves, deny the full effect of the deed or question the right of ingress and egress.
>
> "Rem. & Bal. Code, § 5673, [Rem. Comp. Stat. § 6510] vacating county roads which remain unopened for public use for five years, has no application to and does not affect private rights of easement acquired by deed by an abutter upon a street in a dedicated plat.
>
> "The easement of an abutting owner in a street in a dedicated plat is not lost by abandonment or nonuser, however long continued, until the time arrives when it is required for actual use; hence the right is not lost by the fact that half of the road had been fenced by the owner on the opposite side while ingress and egress had been found over lands of other parties."

In Davison v. Columbia Lodge, 90 Wash. 461, it is held that the owner of property, served with water through a pipe running across an adjoining lot, who used such pipe for more than ten years, it being invisible and the use unknown, could not claim an easement by prescription to maintain the pipe since persons seeking to establish rights over the lands of others without contract must establish their claims by such open uses or assertions as to give the other party an opportunity or duty to deny them.

§ 140. **Effect on, of tax foreclosure.** In Hanson v. Carr, 66 Wash. 81, it is held that a private easement right in land was divested by a tax foreclosure. This announcement is affirmed in Tamblin v. Crowley, 99 Wash. 133, 140.

§ 141. A floating easement may remain indefinitely as a cloud: Netherlands American Mortgage Bk. v. Eastern Ry. & Lumber Co., 142 Wash. 204.

§ 142. An easement is not 'real estate'' within the meaning of that term under the provision of the statute of frauds that a broker's employment to buy or sell "real estate" must be in writing: Barr v. Campbell Mill Co., 154 Wash. 83.

ELECTRIC ENERGY, LIEN FOR

See LIGHT AND WATER LIENS

ENCUMBRANCES

§ 143. Rights granted the public in the dedication of a plat to make cuts, etc., for "reasonable, original grading of streets" may not be an encumbrance: Miskey v. Mazey, 150 Wash. 676.

An encroachment of from 3½ inches to 7⅛ inches is of such a substantial character as to render the vendor's title unmarketable and permit recovery of earnest money paid: Ziebarth v. Manion, 161 Wash. 201.

An established highway over rural property is not an encumbrance sustaining an action for breach of covenant of warranty, even though there are no express exceptions: Walquist v. Johnson, 103 Wash. 30, and Hoyt v. Rothe, 95 Wash 369.

A party wall agreement is an encumbrance on both pieces of property: Hawkes v. Hoffman, 56 Wash. 120.

ESCROWS

§ 144. Many transactions are popularly called an escrow when they are not legally such. In order for a transaction to become a true escrow, each party thereto must part with all control over whatever he lodges with the escrow holder during the time fixed by the agreement for closing the transaction. If the one who lodges a deed, mortgage, contract, or other instrument, or who pays in any cash, has the right to withdraw what he has deposited, or change his instructions without the consent of the other parties to the transaction, it is not a true escrow; instead, the one with whom such instrument or cash is lodged is only the agent of the depositor.

Let us assume a case: John Doe verbally agrees to sell to Richard Roe a tract of land for one thousand dollars; Richard Roe verbally agrees to buy it for that sum; John Doe, the owner, executes a deed of the property to Richard Roe; they both go to a bank; the owner leaves the deed with

the bank with written instructions to deliver the deed to the purchaser at any time within ten days upon the purchaser's paying for the account of the seller one thousand dollars. This is not a true escrow. John Doe, the seller, can withdraw the deed or can change his instructions at any time prior to the time the purchaser makes the payment. The reason is that there is no mutuality; that is, the transaction is one-sided. If it were enforceable, only the seller would be bound. The purchaser has obligated himself only by word of mouth, and it is the law of this state that an agreement to buy or sell real estate must be in writing to be enforceable. The verbal promise of the purchaser not being enforceable, it is not a consideration to support the written agreement of the seller, and every agreement to be enforceable must have a consideration. The law regards the act of the seller as an offer to sell and will not compel its performance unless the offer is accepted before it is withdrawn. The principle of law stated as governing the assumed case finds support in the cases of McLain v. Healy, 98 Wash. 489; Palmer v. Stanwood Land Co., 158 Wash. 487, and the many cases cited in these opinions.

§ 145. To make a transaction a true escrow there must be a meeting of the minds of the parties and a binding contract entered into, which cannot be changed without the consent of all of the parties. As we frequently say, the instruments and funds to be used in closing the transaction must be "locked up" with the escrow holder. On the other hand, if a deed or agreement to sell is left with anyone to be delivered on the payment of a certain sum of money, or the performance of any other condition, even though the instructions are in writing, and without any binding contract between the parties, there is no escrow, because the depositor may recall the instrument or change his instructions at any time prior to the compliance with the offer by the other party to the transaction.

§ 146. **Advantages of escrows.** It is unsafe for anyone to pay out money on either a deed or a mortgage until such deed or mortgage has been filed for record and the title to the property examined to the close of the day on which the instrument is filed. This protection can be had by closing the transaction through a responsible third person acting as escrow holder. This statetment is based on the case of Ellis v. McCoy, 99 Wash. 457, the syllabus to which reads:

> "Where a lis pendens in an action to quiet title is filed after the defendants had conveyed the property to an innocent purchaser, who subsequently filed the deed, judgment quieting the title in the plaintiff has the effect of cutting off the rights of the purchaser."

See also §§ 214 and 215 under topic **Lis Pendens.**

§ 147. **Joint tenancy.** Survivorship between joint tenants was abolished in 1886: § 1344, Rem. Rev. Stat.

§ 148. **Restraint on alienation.** The common law, which is the fundamental law of Washington and most of the states of the Union, does not favor any attempt to limit or restrict the free transfer of property. The courts of the several states are not in full accord in the application of this principle of law, and it is not fully settled in this state, but a recent decision will determine the question as to many, if not most of such attempts. The case is that of Gladstone Mountain Mining Co. v. Tweedell, 132 Wash. 441. Mining claims had been sold under a conditional sale contract and a deed made in pursuance thereof, each of which contained the following provision:

> "It is further agreed by all the parties hereto, that none of the claims above-mentioned shall be sold or mortgaged by said Company without the written consent of all of the parties hereto."

The court said this condition was not like those imposing building restrictions, etc., which have been sustained by our court, and that the condition just above quoted was "invalid under the rule against conditions inhibiting or restricting alienation, at common law." The court then says:

> "The right of alienation is an inherent and inseparable quality of an estate in fee sinple. Potter v. Couch, 141 U. S. 296. While we leave the question open for future consideration as to partial or limited restraint on alienation, as it is not involved here, the general rule is stated in 8 R. C. L. 1114, as follows:
>
> " 'It may be stated, therefore, as a cardinal rule, that an attempted total restraint on alienation is repugnant to a grant of the fee and hence totally inoperative. . . . And among the older text writers and adjudged cases, authority can be found to the effect that the rule does not prevent all conditions and restraints upon the power of alienation, and in a number of cases such restraints as were limited in time, and reasonable in application, were upheld; but these holdings have been said to be based on a misconception of certain early English cases, and, on principle and authority, the better rule is

that a direct restriction for any time, however short, is void.'

"In Potter v. Couch, supra, the United States supreme court held that it was difficult to perceive on principle why a partial restraint is not just as incompatible with the idea of complete ownership as a general restraint.

* * * *

"Jones, Real Property and Conveyances (2d ed.), vol. 1, Sec. 662, says:

" 'After an absolute conveyance in fee simple, a clause providing that the grantee shall not mortgage or dispose of the property is repugnant and void; or that he shall not offer to mortgage, or suffer a fine or recovery. So is a clause prohibiting the grantee from conveying without the consent of the grantor.'

"In fact, as the court of appeals of Kentucy observed in the Kentland Coal & Coke Co. case, supra:

" 'It must be conceded that the great weight of authority outside of Kentucky is to the effect that, where the fee simple title to real estate passes under a deed or will, any restraint attempted to be imposed by the instrument upon its alienation by the grantee or devisee is to be treated as void, and such is clearly the rule announced by Mr. Gray in his excellent work on "Restraints on Alienation".'

"See Gray, Restraints on Alienation (2d ed.), particularly §§ 4, 10, 19, 105, and 279.

"There can be no doubt that the decree is right, and it is affirmed."

§ 149. **Shelley's case, rule in.** In Shufeldt v. Shufeldt, 130 Wash. 253, the rule in Shelley's case was recognized by our supreme court as a part of the law of this state, and in Fowler v. Wyman, 169 Wash. 307, it was stated "that the rule is a rule of decision in this state."

A succinct statement of this rule is given in the Shufeldt case as follows:

"Under the rule in Shelley's case, if an estate for life is granted by an instrument and the remainder is limited by the same instrument, either mediately or immediately, to the heirs of the life tenant, the life tenant takes the remainder as well as the life estate.

"The requisites of the rule are these: 'first, a freehold estate; second, a limitation of the remainder to the heir or heirs of the body of the person taking the freehold estate, by the name of the heirs as a class, and without explanation, as meaning sons, children, etc.; third, the

estates of freehold and in remainder must be created by the same instrument; fourth, the estates must be of the same quality—that is, both legal or both equitable.' "

§ 150. **Perpetuities.** A full discussion of perpetuities may be found in Denny v. Hyland, 162 Wash. 68. At page 72 of this opinion it is said:

"The rule against perpetuities is clearly stated as follows in 21 R. C. L., p. 282, § 2:

" 'The rule against perpetuities is usually stated as prohibiting the creation of future interests or estates which by possibility may not become vested within a life or lives in being and twenty-one years, together with the period of gestation when the inclusion of the latter is necessary to cover cases of posthumous birth.'

"The rule, however, applies only to the vesting of future estates, and does not apply to vested estates. The rule has reference to the time within which the title vests and has nothing to do with the postponement of the enjoyment. 21 R. C. L., p. 290, § 12. If the residue of the estate of the decedent has already vested, or will necessarily vest within a life or lives in being and twenty-one years thereafter, the trust is valid. If, however, the property under the trust will not necessarily vest within the time limited against perpetuities, no estate is created."

§ 151. **Estates tail.** Estates tail had their origin in the Feudal System. Under this system most of the land in England was owned by the nobility and they wished to perpetuate its possession in their own families and in the families of those of their choosing. To that end whenever they transferred land it was to a named person and the heirs of his body. The purpose was to prevent the land from being sold, encumbered or taken for the debts of the transferee and that it would be held in the family of such transferee, and upon failure of such heirs it would revert to the original owner, his heirs or assigns. Blackstone gives the following definition of this estate:

"Now, with regard to the condition annexed to these fees by the common law, our ancestors held that such a gift (to a man and the heirs of his body) was a gift upon condition that it should revert to the donor, if the donee had no heirs of his body; but if he had, it should then remain to the donee. They, therefore, called it a fee simple, on condition that he had issue."

The courts held that when the condition was performed, i. e., when the holder of the conditional fee had an heir, the condition was performed and the estate became a fee simple.

The nobility in their desire to perpetuate the possession of lands in their own families procured a statute to be passed in the year 1285, which, according to Blackstone, "revived in some sort the ancient feudal restraints which were originally laid on alienations, by enacting, that from thenceforth the will of the donor be observed; and that the tenements so given (to a man and the heirs of his body) should at all events go to the issue, if there were any; or, if none, should revert to the donor."

Again quoting from Blackstone:

> "Upon the construction of this act of parliament, the judges determined that the donee had no longer a conditional fee simple, which became absolute and at his own disposal, the instant any issue was born; but they divided the estate into two parts, leaving in the donee a new kind of particular estate, which they denominated a fee-tail; and vesting in the donor the ultimate fee simple of the land, expectant on the failure of issue; which expectant estate is what we now call a reversion."

For those who wish to pursue this question further I suggest they read § 149, et seq. of Book 2 of Blackstone's Commentaries. A full history of this law will there be found and it will be seen that not only might an estate tail be limited to the heirs of the body generally of a given person but that there might be other limitations, such as male or female heirs, etc.

A statute (Rem. Rev. Stat., § 143) enacted in 1863 and still in force, reads:

> "The common law, so far as it is not inconsistent with the constitution and laws of the United States, or of the state of Washington, nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state."

In Garrett v. Byerly, 155 Wash. 351, 354, it is said:

> "Construing this statute (i. e., the statute just above quoted) we have held that the term 'common law,' as therein used, includes not only the unwritten law of England as it was administered by its courts, but also the general statutes of that commonwealth modifying and interpreting the unwritten laws which were enacted prior to and in force at the time of our Declaration of Independence."

Estates tail existed as a part of the common law of England on July 4, 1776. Such estates are not abolished by any

statute of this state. Therefore they exist here unless "inconsistent with the constitution and laws of the United States, or of the state of Washingon, nor incompatible with the institutions and condition of society in this state." This estate is not inconsistent with the United States constitution or its laws, nor with the state constitution. If then such an estate does not exist in Washington it is because,

1. It is inconsistent with the laws of the state of Washington; or,

2. It is "incompatible with the institutions and condition of society in this state."

First, laws: It might be held that an estate tail is inconsistent with our community property system by reason of the wording of the provision as to descent of such property, although I do not see any inconsistency. But as to separate property there is, in my opinion, no law which is inconsistent with an estate tail.

Next, as to such estates being "incompatible with the institutions and condition of society in this state." We recognize a life estate, and an estate tail gives the holder greater rights than a life estate. We recognize contingent and vested remainders and the right of reversion. What is there then in an estate tail which would make it "incompatible with the institutions and condition of society in this state?"

In Fowler v. Wyman, 169 Wash. 307, there was considered a deed of gift to a daughter so that it was her separate property. The wording of the deed was such as to create an estate tail, but the court held that a fee simple estate passed by the deed.

It was not suggested in any of the briefs in this case that an estate tail was created, and the question is not mentioned in the opinion. Therefore, the question is still an open one in this state under the rule announced by our supreme court in Continental Mutual Savings Bank v. Elliott, 166 Wash. 283, 300, that:

> "An opinion is not authority for what is not mentioned therein and what does not appear to have been suggested to the court by which the opinion was rendered. Pue v. Wheeler, 78 Mont. 516, 255 Pac. 1043; Moinet v. Burnham, Stoepel & Co., 143 Mich. 489, 106 N. W. 1126; People ex rel. Crabb v. District Court, 66 Colo. 438, 182 Pac. 5."

CONCLUSION: It is an open question as to whether estates tail exist in Washington, with the arguments for an against their existence about evenly balanced as to community property and strongly supporting their existence as to separate property.

EXECUTORS AND ADMINISTRATORS

See also, PROBATE PROCEEDINGS, WILLS

§ 152. An executor under a non-intervention will may sell only for the purpose of paying debts and expenses of administration; and a deed by an executor ten years after the death of the testator is sufficient to put a prospective purchaser on inquiry: Hutchings v. Fanshier, 132 Wash. 5.

A foreign corporation named to act as trustee under a will must first qualify as other foreign corporations to do business in this state: Wallace v. State, 164 Wash. 576.

It is held in Russell v. First National Bank, 169 Wash. 430, 437, that a provision in a will that the testator's wife who was named as executrix should "have the full right to sell or otherwise dispose of" property, gave the right to mortgage the property.

EXECUTORY CONTRACTS

See, also, VENDOR AND PURCHASER

§ 153. **Ashford v. Reese.** Nothing our supreme court has ever said has occasioned more comment and criticism by both bench and bar than the statement in Ashford v. Reese, 132 Wash. 649, that "an executory contract of sale in this state conveys no title or interest, either legal or equitable, to the vendee."

§ 154. **Forfeiture clause.** The rule announced in the Ashford-Reese case "is limited to those contracts which by their terms are forfeitable:" Aylward v. Lally, 147 Wash. 29, and cases cited, particularly Taylor v. Interstate Investment Co., 75 Wash. 490.

§ 155. It would be interesting to endeavor to digest and classify the decisions of our court in support of and at variance with the rule above quoted from the Ashford-Reese case, but I will only cite the cases at variance with this rule decided before and after the Ashford-Reese decision for the purpose of demonstrating that one dealing with the title to a piece of

real estate cannot rely upon this rule, and that where there is either actual or constructive notice of an executory contract, it is necessary to acquire or have relinquished or forfeited the purchaser's rights, whatever they may be, by reason of such contract.

The most glaring inconsistencies are in the holdings that on the death of the vendor in an executory contract his interest therein is administered as personal property (Hyde v. Heller, 10 Wash. 586; Griggs Land Co. v. Smith, 46 Wash. 185, and In re Fields' Estate, 141 Wash. 526) and that a gift **causa mortis** may be made of a vendor's interest in an executory contract, it being personality: Davie v. Davie, 47 Wash. 231.

Judge Tolman in his dissenting opinion in the Ashford-Reese case cites many cases at variance with the doctrine that "an executory contract of sale in this state conveys no title or interest, either legal or equitable, to the vendee." In addition to the cases cited by Judge Tollman there are, I think, two others which may be added to his list. One is Zeimantz v. Blake, 39 Wash. 6, holding that a release, by a husband, of a contract to purchase property not joined in by the wife was ineffective as to her. The other is Ihrke v. Continental Life Ins. & Inv. Co., 91 Wash. 342, holding that the purchaser has a lien for money paid when the vendor refuses to fulfill the contract and that a subsequent purchaser of the property with notice of the contract takes subject to the lien.

§ 156. The opinion by the majority of the court is not in full accord with the following cases, viz:

Bendon v. Parfit, 74 Wash. 645, holding that actual possession of property by a vendee under an oral contract of sale imparted notice of his rights to a subsequent purchaser;

State ex rel. Hall v. Savidge, 93 Wash. 676, holding that a purchaser under contract from the state is the owner within the meaning of the act providing for reservation of minerals, etc.;

Tyler v. Casey, 115 Wash. 25, holding that a forfeited contract of purchase, together with a quit claim deed by the purchaser constitutes a cloud on the title of the vendor;

State ex rel. Holt v. Hamilton, 118 Wash. 91, holding that a purchaser under contract is entitled to a vote in the selection of the officers of an irrigation district.

§ 157. I give below a few cases decided after the Ashford-Reese case, which are at variance with this rule.

A purchaser under an executory contract has such rights as come within a designation of "real property" so that an attachment may be levied against his interest: State ex rel. Oatey Orchard Co. v. Superior Court, 154 Wash. 10, and Epley v. Hunter, 154 Wash. 163.

An executory contract creates such a right in the purchaster as will enable him, on performance of the contract, to enforce specific performance of his contract against the land which is the subject of the contract: Culmback v. Stevens, 158 Wash. 675. A purchaser under an executory, forfeitable contract has a right to recover damages to the freehold caused by mining underneath: Peters v. Bellingham Coal Mines, 173 Wash. 123.

A judgment rendered against the vendor in an executory contract after the delivery of the contract, will not attach against the vendor's interest if the contract purchaser has paid out in full and had no previous notice of the judgment: Vandin v. McCleary Timber Co., 157 Wash. 635.

§ 158. **Assignability.** An executory contract for the sale of real estate is assignable where such contract does not prohibit the assignment thereof: Hunter Tract Imp Co. v. Stone, 58 Wash. 661.

But where the contract provides that it is not assignable without the consent of the vendor, and that a violation thereof will work a forfeiture, such provision is enforceable: Lockerby v. Amon, 64 Wash. 24, and Boyd v. Bondy, 113 Wash. 384.

§ 159. **Judgments.** An examiner of a title is not concerned as to whether a creditor of the vendor or of the purchaser may be able to realize on his claim out of the real estate which is the subject of the executory contract, but he is interested in knowing whether a judgment against either the vendor or the purchaser is a lien on the property and how a clear title may be obtained from the vendor to the purchaser or his assignee or grantee.

The holding in the case of Vandin v. McCleary Timber Co., supra, might be relied upon so as to ignore a judgment against the vendor if the facts were established of record. I know of no way of establishing them of record short of a suit to quiet title.

As to judgments against the purchaser under an executory contract it is true that our court has held in Phoenix Mining Co. v. Scott, 20 Wash. 48, that a judgment is not a lien on an equitable estate of a judgment debtor, but if, as held in the two cases above cited a purchaser's interest in such a contract was sufficient to support an attachment, may it not be held that the interest of a purchaser is such as to support the lien of a judgment against such a purchaser? Besides, if the title passes through the original purchaser or any assignee in order to vest in a subsequent assignee and there is a judgment against such purchaser or assignee at the time of the passing of the title through him, such judgment will attach as a lien on the real estate: Ruuth v. Morse Hardware Co., 74 Wash.

361. The court says that the judgment meets the title the instant it reaches the judgment debtor and attaches as a lien before the title can pass out of him.

§ 160. **Forfeiture.** The provision in an executory contract as to the method of giving notice of forfeiture is controlling: Bedtelyon v. Otis Orchards Co., 106 Wash. 151.

Where the contract provides for forfeiture and that time is of the essence of the contract, and there is no provision for the giving of notice of intention to forfeit, no notice of intent is necessary, unless such strict forfeiture has been waived: Garvey v. Barkley, 56 Wash. 24, and Sisson v. Durrant, 152 Wash. 382, 385.

In Wadham v. McVicar, 115 Wash. 503, it is said:

> "Strict performance may be waived by receiving without objection, payment after the time provided in the contract or by granting other indulgences."

A number of prior decisions of our court are cited in the opinion in that case, and the court has followed this rule in Staten v. Railway Land & Improvement Company, 128 Wash. 476; Bodin v. Wilcox, 129 Wash. 208, and Reinertson v. Grant, 140 Wash. 372.

§ 161. **Notice of forfeiture.** Where notice is necessary and the kind of notice to be given is not fixed by the contract, is personal notice necessary? In Weyerhaeuser Timber Co. v. Pierce County, 133 Wash. 355, 359, it is said:

> "The rule is general that where notice is required to be given, and the mode and manner of giving it is not prescribed, a personal service is requisite."

Our court has never applied this rule to executory contracts. In Staten v. Railway Land & Improvement Company, 128 Wash. 476, it seems to be assumed that notice by letter mailed to a known address of the purchaser is sufficient. But the safe course to pursue is to give personal notice.

§ 162. **Waiver of forfeiture.** The right of forfeiture may be waived by extending time for payment: Douglas v. Hanbury, 56 Wash. 63; Bodin v. Wilcox, 129 Wash. 208, and Reinertson v. Grant, 140 Wash. 372.

But if the vendor makes it plain to the purchaser that such extensions and acceptance of partial payments are not to affect the strict performance provisions of the contract, or

by proper notice reinstates these provisions, they will be enforced by the courts. In the very recent case of Alhadeff v. Van Slyke, 76 Wash. Dec. 167, it is said:

> "We are committed to the rule that, where a vendor has waived strict performance of a contract, like that in the case at bar, by acceptance of payments thereunder after maturity, the forfeiture of the contract can not be claimed without notice and an opportunity given to perform. Douglas v. Hanbury, 56 Wash. 63, 104 Pac. 1110, 134 Am. St. 1096; Reinertson v. Grant, 140 Wash. 372, 249 Pac. 493; Great Western Investment Co. v. Anderson, 162 Wash. 58, 297 Pac. 1087. However, where there has been a waiver of strict performance of the clause making time of the essence of the contract, such contractual provision may be restored to full force by the vendor's notices and warnings that the provision was not waived and that all future payments must be made in strict accordance with the terms of the contract. Sleeper v. Bragdon, 45 Wash. 562, 88 Pac. 1036; Great Western Investment Co. v. Anderson, 162 Wash. 58, 297 Pac. 1087."

§162½. **Tender of deed.** The rule as to the necessity of tendering a deed as a condition to the forfeiture of an executory contract is clearly set out in the case of Weisberger v. Smith, 75 Wash. Dec. 253, where it is said:

> "The contention principally urged and relied upon by the appellant is based upon a long line of decisions by this court, beginning with Mudgett v. Clay, 5 Wash. 103, 31 Pac. 424, and continuing down to Carter v. Miller, 155 Wash. 14, 283 Pac. 470, which lay down the general rule that a vendor cannot forfeit such an executory contract for default in meeting the final installment without tendering a deed and demanding the payment. Here, of course, if it was necessary to tender a deed, it was also necessary to tender performance of the conditions of the contract as to a survey and the furnishing of an abstract.
>
> "The rule is well settled, and the exceptions to the rule are equally well settled. We have repeatedly held that, when it appears that the vendee cannot, or will not, perform, a tender would be a useless and idle thing, such as the law never requires to be done. Bruggemann v. Converse, 47 Wash. 581, 92 Pac. 429; Kane v. Borthwick, 50 Wash. 8, 96 Pac. 516, 18 L. R. A. (N. S) 486; Finch v. Sprague, 117 Wash. 650, 202 Pac. 257; Bodin v. Wilcox, 129 Wash. 208, 224 Pac. 558."

§ 163. **Relinquishment.** It has been the custom in this state where a purchaser in an executory contract wishes to surrender his right thereunder for him to give a quit claim deed of the property to his vendor. I prefer what I call a "relinquishment" of his right to the taking of a deed from him. If a deed is taken it is necessary to have the spouse of the purchaser join in the deed and to be satisfied that there are no judgments against either the purchaser or his or her spouse. But if a relinquishment is taken these questions are avoided. I prepared a form of relinquishment which I have found a purchaser will sign more readily than he will a quit claim deed. When he is asked to sign a quit claim deed he thinks he is surrendering something and usually demands that he be paid for executing the deed. The relinquishment form, which I have prepared, suggests a benefit to the purchaser in that it releases him from further obligation under the contract. This form names the vendor as the first party and the purchaser as the second party, recites the execution of the contract on the property described; that the contract provided that time was of the essence thereof, and for a forfeiture in case of default by the purchaser and then closes as follows:

> "That the second party has been unable to keep the terms of said contract and wishes to be absolved from all liability thereunder, and the first party is willing to so absolve him on his admitting default and forfeiture and relinquishing all rights under the contract and in the property;
>
> "NOW THEREFORE, in consideration of the mutual agreement herein, the first party does hereby release the second party from all further liability under said contract and the second party admits that said contract has been abandoned and all rights thereunder forfeited, and does hereby acknowledge that said contract is at an end and that all rights thereunder have been forfeited."

It is advisable but not necessary to have the spouse of the purchaser join in the instrument; and while an acknowledgment is probably not necessary to make the contract binding it is necessary to entitle it to be recorded.

FIXTURES

§ 164. **Definition.** A fixture is defined by our supreme court in Gasaway v. Thomas, 56 Wash. 77, as follows:

> "A fixture is generally defined as an article which was once a chattel but by physical annexation to the realty has become accessory to and part and parcel thereof."

There are some chattels that become a part of the real estate and yet do not come within the definition of fixtures. All of the material which goes into a building—brick, cement, wood, etc., are originally chattels, but they become a part of the real estate. Any unpaid part of the purchase price for such articles may be usually recovered through materialmen's liens. If the seller does not protect himself by such a lien his claim against the property which was a chattel is lost. On the other hand, there are some chattels that go into a building which always retain their chattel character. Of this class are articles of furniture, both household and office, and then a class of articles called "trade fixtures," such as shelves, counters, show cases, etc.

Our discussion does not cover articles included in either of the above classes. We are considering that intermediate class of property which may or may not become a part of the real estate, dependent largely upon the intent of the one who attaches the article.

§ 165. **General principles.** There is one principle of law in regard to fixtures on which there is no disagreement and to which there are no exceptions. It is that the cardinal inquiry in determining whether a chattel becomes a fixture is the intent of the party making the annexation, determined in large measure by the facts and circumstances attending the annexation. Our supreme court said in the case of Washington National Bank v. Smith, 15 Wash. 160, that the intent is not to be shown by the actual state of mind of the person attaching the article, but is to be gathered from the circumstances surrounding the transaction and from what was said and done at the time. Some of the facts and circumstances which influence the court to hold such articles are fixtures, are that the chattel cannot be removed without material injury to the freehold, or that the chattel is essential to the support of some part of the permanent structure, or that after the chattel's removal it loses its identity and becomes practically

valueless, or that the chattel cannot be removed without substantial injury to the building. The fact that a building may be less valuable after the removal of the article is not a factor in determining the right of removal.

Our supreme court has taken a most liberal view of the right to remove from a building articles which are regarded by some as fixtures. In the case of Philadelphia Mtge. & Trust Co. v. Miller, 20 Wash. 607, the court says that, "In investigating a question of this kind we cannot shut our eyes to the many changes that have been wrought by time in the character and fashion of household furnishings," and that anciently, mantels, sideboards, bathtubs, etc., were designed for a house and built as a part of the house, but now many of these articles are what are called "stock" goods, and they held that the articles in controversy consisting of mantels, hot water heater or boiler, and bathtubs could be removed from the building by the mortgagors, it having been shown they were stock goods and could be removed without material injury to the building. In the course of the opinion it is said that all such articles are as readily removable and no more subject to the lien of a mortgage than is the ordinary stove which is connected by pipes to the boiler and to the plumbing system generally. The "ordinary stove" of that day is now very often the electric range, which is as easily disconected as a piano lamp. A little later this opinion was followed by the case of Hall v. Law Guarantee & Trust Society, 22 Wash. 305, which held that gas and electric light fixtures, a windmill, a hot water tank, and window and door screens, although attached to a house, were not fixtures as between a mortgagor and mortgagee.

§ 166. Provident Mutual Life Insurance Co. v. Smith, decider December 11, 1933, 75 Wash. Dec. 308, involved a controversy between the Frigidaire Sales Corporation, as vendor under a conditional sale contract of cooling equipment for an apartment house, and the plaintiff, as mortgagee. The court found that the mortgagee made its mortgage and advanced a goodly part of the moneys thereunder before commencement of delivery of the equipment and "without knowledge that the equipment would be installed, and without relying upon its installation for the sums advanced and to be advanced under the mortgage." The court further found that—

> "the refrigerating cabinets and coils in the several apartments and the compressors in the basement were not structural parts of the building, and could be detached and removed therefrom without damage and with but little expense. After all, we are concerned here with forty-five separate refrigerating units, placed in as many

> apartments, and two compressors in the basement. The tubing connecting the compressors with the cabinets was installed in the walls under a separate contract and as part of the building structure."

and concludes that—

> "the intention of the parties, the stock type of equipment, the manner of installation, and the possibility of removal without material damage, all concur in establishing the chattel character of the equipment. Since the Frigidaire equipment always retained its chattel character, it did not become subject to the lien of appellant's mortgage."

The court draws a distinction between the case under consideration and the case of King v. Blickfeldt, 111 Wash. 508, which was a controversy between a mortgagee and an elevator company over an elevator in an apartment house. In the King case it was shown that the mortgagee relied upon the elevator as a part of the building when it placed its loan thereon and did not know that it was sold under a conditional sale contract. In the Provident Mutual case the court says of the King case that—

> "The elevator was integrated with the building and became a component and essentially structural part of it."

§ 167. **Parties concerned.** Controversies as to whether certain articles are fixtures when they are sought to be removed from a building generally arise when a tenant seeks to do so over the protest of a landlord, a vendor over the protest of his purchaser, the fee owner over the protest of a mortgagee or the seller of the article over the protest of either the fee owner or the mortgagee. There are different rules for determining whether such articles become a part of the real estate dependent upon the relationship existing between the parties. The same article placed in a building by a tenant and subject to removal by him as a chattel would be regarded as a fixture and not subject to removal in a controversy between a vendor and his purchaser.

§ 168. **Landlord and tenant.** The leading case on what articles placed in a building by a tenant may be removed on the termination of the lease is Ballard v. Alaska Theatre Co., 93 Wash. 655. This case is particularly interesting in light of the fact that the tenant was allowed to remove from the building opera chairs screwed to the floor when our court had held in Filley v. Christopher, 39 Wash. 22, that opera chairs

became a part of the real estate where the controversy was between one who had acquired the title to the real estate under foreclosure of a mortgage and the prior owner of the property.

The Ballard-Alaska Theatre case is very full in its discussion and emphasizes the fact that,

> "When the annexation is made by a tenant * * * the presumption is that he did not intend to enrich the freehold, but intended to reserve title to the chattel annexed in himself, while from an annexation by the owner of the property, the presumption is the other way."

§ 169. Upon a tenant's surrender of leased premises upon demand of the landlord terminating the tenancy before the expiration of the term, the tenant's mortgagee of removable trade fixtures is entitled to a reasonable time after notice of the termination of the lease within which to remove the mortgaged fixtures: M. H. B. Company v. Desmond, 151 Wash. 344.

§ 170. **Vendor and purchaser.** There is no outstanding decision by our supreme court in a controversy between a vendor and purchaser. However, the question is very fully discussed in Ballard v. Alaska Theatre Co., supra, and in the case of Hall v. Dare, 142 Wash. 222.

§ 171. **Fee owner and mortgagee.** The leading cases announcing the principles of law governing the relations between the fee owner and mortgagee with respect to fixtures are set out in the subheads, "Definition" and "General principles," §§ 164 and 165. I there stated that the cardinal inquiry in determining whether a chattel becomes a fixture is the intent of the party making the annexation and that our supreme court had said that the intent is not to be shown by the actual state of mind of the person attaching the articles but is to be gathered from the circumstances surrounding the transaction and what was said and done at the time.

I suggest that as between the fee owner and the mortgagee the latter may protect himself against removal of the articles which are usually the subject of controversy by substantially the following covenant in his mortgage:

> "It is covenanted and agreed that all awnings, door and window screens, mantels, and all plumbing, lighting, heating, cooling, ventilating, cleaning, elevating, watering and irrigating apparatus and fixtures now or hereafter belonging to or used in connection with the premises are

and shall be deemed to be fixtures, and each and all shall be an accession to the freehold and a part of the realty.".

§ 172. **Conditional sale vendor.** I have just suggested that a mortgagee may protect himself against removal of certain articles so far as a fee owner is concerned by a covenant in the mortgage. It is doubtful if such a covenant will affect the rights of a seller of chattels which are to go into a building when the same are sold on a conditional sale contract. Our supreme court has held a number of times that the **intent** that certain articles should not become fixtures and a part of the real estate is shown by such articles being sold under **a** conditional sale contract wherein the vendor retains title until full payment is made for such articles. See Boeringa v. Perry, 96 Wash. 57; Allis-Chalmers Manufacturing Co. v. Ellensburg, 108 Wash. 533, and King v. Blickfeldt, 111 Wash. 508, and cases cited in the opinions in these cases.

§ 173. The latest case decided by our supreme court on this question, Provident Mutual Life Insurance Co. v. Smith, 75 Wash. Dec. 308, holds that the cooling apparatus there in question was no part of the real estate. The lower court found that the cabinets were stock models; that they were not fastened in any manner to the real estate but set in a space in the building provided for that purpose and might be removed without any material damage to the walls of the building. Another part of the equipment were freezing units each placed in one of the cabinets and the coils were not fastened to the building but fastened to the inside of the cabinets so that the same might be removed without damage to the building. The court held this equipment to be substantially the same as the machinery of a sawmill which was held not to be a fixture in Zimmerman v. Bosse, 60 Wash. 556.

Chattels of the nature involved in the Provident Mutual-Smith case are, according to the holding of the court, not effected by the recording act so far as a mortgagee of real property is concerned. Of course if one was a purchaser of these chattels or a mortgagee of them he would be protected by the recording act.

§ 174. **Recording act.** The provision for recording conditional bills of sale in order to give notice to bona fide purchasers and encumbrancers thereof was amended in 1933, Laws of '33, p. 465, so as to require articles which but for their sale on condition would become fixtures to describe the property where the chattel is located and have the same recorded as a real estate mortgage.

Prior to this act, when such personal property was sold under conditional sale and delivered to the vendee and the conditional sale contract was required to be filed, it was sufficient if it described the personal property sold and gave the residence of the vendee.

§ 175. **Ten days for filing.** The Act of '33 requires that all chattels which would become fixtures but for their being sold under conditional bill of sale will become fixtures as to bona fide purchasers and encumbrancers of the real estate unless the conditional bill of sale contains a description of the real estate to which the chattel is to be affixed and the same filed in the auditor's office of the county wherein the property is located within ten days after the delivery of such chattel. The auditor is required to index and record such conditional bills of sale in the same manner as mortgages of real estate are indexed and recorded.

Emphasis should be placed on the fact that the seller has ten days after delivery within which to file the conditional bill of sale. When is delivery of a chattel complete? Take an elevator in an apartment house. Is delivery complete until practically every bolt and screw is in place? Add then ten days to that time and one dealing with real estate must exercise great care to protect against repossession of many fixtures which go into a building.

GUARDIAN AND WARD

§ 176. An excellent discussion of this subject will be found in the case of Mathieu v. U. S. Fidelity & Guar. Co., 158 Wash. 396.

An appointment of a guardian for an insane person, without notice, is void for want of jurisdiction; and notice must also be served on the Prosecuting Attorney: Mayer v. Rice, 113 Wash. 144, and In re Teeters, 173 Wash. 138.

HOMESTEADS

See, also, Subhead Award in Lieu of Homestead, § 279, under PROBATE PROCEEDINGS

§ 177. Homesteads are favored by the law and the statutes creating them are liberally construed. Nevertheless, a homestead is a creature of the statute and only those are entitled to a homestead who are granted such right by statute; the selection must be out of property designated by statute as subject to a homestead, of the value fixed by statute and the same must be selected in the manner prescribed by statute.

§ 178. The homestead statute requires that one must be the head of a family in order to file a declaration of homestead. The legislature of 1933 (Laws of '33, p. 192) broadened the list of dependents to constitute one a head of a family.

§ 179. The form of the declaration of a homestead has not been changed for many years, nor has the class of property out of which a homestead may be created or the value of such property. But the legislature has changed many times the time when the declaration of homestead must be filed.

§ 180. Under the Homestead Act of 1895, which was in force until June 9, 1927, the filing must have been before judicial sale: State ex rel. Jakubowski v. Superior Court, 84 Wash. 663.

§ 181. Under the law in force between June 9, 1927 (Rem. Comp. Stat. 1927 Sup'l., § 528), and June 11, 1931 (Laws '31, p. 261), a declaration of homestead to be effective as to a judgment rendered subsequent to June 9, 1927, must have been filed before rendition of such judgment: State ex rel. Columbia Valley Lumber Co. v. Superior Court, 147 Wash. 574.

§ 182. But as to judgments rendered prior to the passage of the act of 1927 a declaration of homestead could be filed at any time before sale: Spencer v. Pacific Mercantile Agency, 154 Wash. 191, and Bilyeu v. First National Bank, 154 Wash. 544.

§ 183. The act of the legislature above referred to, which became effective June 11, 1931, restored the prior law, and the declaration of homestead, if in proper form, is effective if filed before sale.

The supreme court in State ex rel. Union Savings & Loan Assn. v. Superior Court of King County, 75 Wash. Dec. 128,

held that the provision of the law of 1931 (Laws of that year, p. 261) providing for the serving of notice on a judgment debtor to file a declaration within thirty days after such service, does not alter the positive requirement that the declaration must be filed before sale under a judgment to be effective against such judgment.

§ 184. **When effective.** A homestead right does not exist until specific property is selected as such and in the manner provided by statute: Brace v. Burbank, 87 Wash. 357, 365.

A valid declaration must be filed before the right of homestead is effective: State ex rel. Jakubowski v. Superior Court, 84 Wash. 63, and cases cited.

§ 185. **Effect.** A proper declaration of homestead has the effect of removing from the property selected the lien of any judgment against the declarant or his or her spouse: Kenyon v. Erskine, 69 Wash. 110; Security Nat'l. Bank v. Mason, 117 Wash. 95, and First Nat'l. Bk. of Pasco v. Galloway, 132 Wash. 355.

The lien of a general judgment does not operate upon, and does not attach to, premises which constitute a homestead, nor does the lien attach to the excess in value above the homestead exemption. "As a general rule the lien of a judgment only attached to property which there is a present power to sell": Traders' National Bank v. Schorr, 20 Wash. 1.

The lien of a purchase money judgment is not removed by a declaration of homestead: Lyon v. Herboth, 133 Wash. 15.

§ 186. **Method of securing.** The declaration must be executed and acknowledged as a deed and must contain the statutory requirements: State ex rel. Jakubowski v. Superior Court, 84 Wash. 663; Security National Bank v. Mason, 117 Wash. 95, and First National Bank v. Galloway, 132 Wash. 355.

§ 187. **Lack of seal.** Lack of a notarial seal to the acknowledgment to a declaration of homestead is fatally defective: U. S. Fidelity & Guar. Co. v. Alloway, 173 Wash. 404.

§ 188. **Value of property.** In John Hancock Mutual Life Ins. Co. v. Wagner, 74 Wash. Dec. 186, it is said:

> "The important question to be determined is whether the extent of a homestead in this state is to be determined upon the fee simple value of the land or from the value of the homestead claimant's interest therein, above the mortgages and other valid liens. It is a new question in this court. However, we have allowed a homestead in a

portable bungalow on leased land on which the declarant resided. Downey v. Wilbur, 117 Wash. 660, 202 Pac. 256. We have also allowed a homestead by a declarant who was a purchaser in possession of real property, under an executory contract for the purchase thereof, and held that

> "'. . . nowhere in the statutes providing for homesteads is there any requirement that the person asserting the right must own either a legal or an equitable interest in the property claimed.' Desmond v. Shotwell, 142 Wash. 187, 252 Pac. 692.

"It is but logical, in view of those decisions under our statute and going no further than they go, to hold that the value of a homestead in this state under our statute is not to be determined from the fee simple value of the land, but from the value of the homestead claimant's interest therein. As in the Downey case, supra, approved in the Desmond case, supra, it was held that,

> "'. . . if a claimant has a sufficient interest in real property to entitle him to maintain a home thereon he has such an interest as will entitle him to protection under the homestead statute.'

"The deduction of incumbrances upon lands claimed as a homestead is simply allowing a homestead upon the net value of, in common parlance, the 'equity' therein."

§ 189. **Class of property.** Use as a home, or intended use, is sufficient even though at the time the declaration is filed the property is occupied by a tenant; however, the declaration must be made in good faith: Canadian Bank of Commerce v. Kellough, 142 Wash. 335.

If the claimant has a sufficient interest in real property to entitle him to maintain a home thereon, he has such an interest as will entitle him to protection under the homestead statute. A homestead on a leasehold interest sustained: Downey v. Wilbur, 117 Wash. 660.

A purchaser under an executory contract has a right of homestead as against a general judgment creditor: Desmond v. Shotwell, 142 Wash. 187. But the right of homestead would not exist against the vendor in the contract, for the lien of a purchase money judgment is not removed by a declaration of homestead: Lyon v. Herboth, 133 Wash. 15.

A tract of land ⅛th of a mile distant from the land on which claimant resided cannot be included in the declaration of homestead: Vojta v. Buhre, 165 Wash. 384.

An intervening alley is not sufficient to be regarded as

cutting off one piece from the homestead: Morse v. Morris, 57 Wash. 43.

§ 190. **Disposition or abandonment.** Property which has been selected as a homestead can be conveyed or encumbered only by the act of both husband and wife even though it be the separate property of one of them: Rem. Rev. Stat., § 534, and Anderson v. Stadlemann, 17 Wash. 433.

When property has become a homestead, it cannot be abandoned except by the method provided by statute which is by relinquishment properly signed and acknowledged by both husband and wife: Hookway v. Thompson, 56 Wash. 57; Wentworth v. McDonald, 78 Wash. 546, and Byam v. Albright, 94 Wash. 108. In the latter case, the homestead claimants moved from the state of Washington and took up their residence in the state of Oklahoma but the court held that the claimants still held the property in Washington as a homestead; that their right thereto as a homestead became fixed at the time the declaration was filed and could only be lost or abandoned in the method prescribed by statute.

§ 191. **Enforcement of judgment.** A judgment creditor may, by proper proceeding, attach the homestead but, until he moves, the property may be mortgaged or conveyed free from the lien of the judgment. A proper declaration of homestead has the effect of removing from the property selected the lien of any judgment against the declarant or his or her spouse: Kenyon v. Erskine, 69 Wash. 110; Security National Bank v. Mason, 117 Wash. 95, and First National Bank of Pasco v. Galloway, 132 Wash. 355, except a purchase money judgment, Lyon v. Herboth, 133 Wash. 15.

HUSBAND AND WIFE

§ 192. Almost all questions affecting land titles in this state which are sometimes indexed and digested under the topic, HUSBAND AND WIFE, grow out of, or are intimately connected with, our law of community property and are discussed under that topic.

§ 193. **Deeds between spouses.** The matters pertaining to this subhead are discussed under COMMUNITY PROPERTY;

deeds between spouses to be delivered on death of either, under the heading **Mutual Deeds,** § 102, and deeds to be delivered during the lives of each, under the subhead **Deeds between spouses,** § 86.

§ 194. **Married woman's civil disabilities.** All civil disabilities of a married woman are removed and a married woman is placed on the same footing, as regards property rights, as a married man. See §§ 6901 to 6907, inclusive, of Rem. Rev. Stat. and cases there cited.

Notwithstanding these provisions and because of the relationship of husband and wife, an instrument executed by an attorney-in-fact to his wife is voidable: Hay v. Long, 78 Wash. 616.

Because of the relationship between husband and wife, it is not safe to pass a deed from one spouse as executor or administrator to the other spouse as purchaser: 11 Ruling Case Law, p. 360, paragraph 425.

§ 195. **Property settlement agreements.** In In re Madden's Estate, 76 Wash. Dec. 1, a property settlement agreement between husband and wife was set aside because the court found it to be unreasonable. It was held that because of the confidential relation existing between a husband and wife it is necessary in making a property settlement agreement that the wife have independent advice or be advised by the husband as to her rights. The court says:

> "While the common law disabilities of married women have been removed by statute in this state, the confidential relationship existing between husband and wife is still recognized to exist. See Rem. Rev. Stat., §§ 1214, 5828. In such relationships of confidence, courts of equity examine with great care transactions between the parties and agreements affecting their property rights. The burden, in such cases, is on him seeking to sustain the agreement to prove that it was fair and entered into with full knowledge of the facts by the one reposing confidence."

§ 196. **Election under a will.** A surviving spouse is not put to an election by the will of the other spouse unless specific property of the testator is willed to such spouse: Herrick v. Miller, 69 Wash. 456.

INCUMBRANCES, See, ENCUMBRANCES

JUDGMENTS

§ 197. **Presumption of validity.** In Allen v. Starr, 104 Wash. 246, it is said:

> "While it is true that a sheriff's return is not conclusive evidence of the facts therein stated, it is also true that, after a judgment has been rendered upon proof made by the sheriff's return, such judgment should only be set aside upon convincing evidence of the incorrectness of the return, in order that judicial conclusions may possess regularity and stability. After judgment, the burden is upon the person attacking the service to show, by clear and convincing proof, that the service was irregular. McHugh, v. Connor, 68 Wash. 229, 122 Pac. 1018."

Effect of recitals in a judgment as to the sufficiency of service and the method of overcoming them discussed: Burns v. Stolze, 111 Wash. 392.

Jurisdiction over the person is essential to a valid personal judgment. If lack of jurisdiction appears by the record or by any other admissible evidence, the judgment is void, and such judgment may be vacated at any time: Dane v. Daniel, 28 Wash. 155, 164-5.

A discussion of the parts of the record which may be considered affirmatively to show lack of service: Rockwood v. Turner, 89 Wash. 356.

§ 198. **Extent of lien.** The lien of a judgment attaches at the very moment of the entry of the judgment and has priority according to entry: Mayer v. Morgan, 26 Wash. 71.

A judgment attaches as a lien on real estate when the title passes through the judgment debtor who had, prior to acquiring the title, conveyed the property by a deed sufficient to pass an after-acquired title. The judgment meets the title the instant it reaches the judgment debtor and attaches as a lien before the title can pass out of the judgment debtor: Ruuth v. Morse Hardware Co., 74 Wash. 361.

The filing of a supersedias bond has the effect only of staying proceedings on the judgment, and does not operate to defeat or destroy the force and effect of the judgment itself: Fawcett v. Superior Court, 15 Wash. 342, and State ex rel. Sprague v. Superior Court, 32 Wash. 693.

Where property has been sold under a judgment for less than the amount of the judgment, and thereafter redeemed by the judgment debtor or his grantee, it can again be sold under execution on the deficiency: Ford v. Nokomis State Bank, 135 Wash. 37.

A judgment is not a lien on an equitable estate of a judgment debtor: Phoenix Mining Company v. Scott, 20 Wash. 48.

A judgment is not a lien on a leasehold interest: Myers v. Arthur, 135 Wash. 583.

A judgment against a husband alone is presumptively a community judgment. The fact that it is not a community judgment may be established by the community in appropriate proceedings: Yakima Trust Co. v. Zintheo, 135 Wash. 389, and Woste v. Rugge, 68 Wash. 90.

The interest of a purchaser in an executory contract of sale may be sold under a judgment against such purchaser: Casey v. Edwards, 123 Wash. 661.

> (The statement in the above case to the effect that a purchaser under an executory contract had only a personal property right prior to the time the full consideration is paid is overruled in State ex rel. Oakey Orchard Co. v. Superior Court, 154 Wash. 10.)

A purchase money mortgage takes precedence over a judgment rendered prior to the mortgage: Bisbee v. Carey, 17 Wash. 224.

A judgment creditor may obtain execution on his judgment after death of the judgment debtor and the latter's estate was in process of administration, where the judgment was obtained before the death of the debtor and constituted a lien upon his property: In re Hackett's Estate, 120 Wash. 236.

A judgment for alimony payable in future installments is such a final judgment as to authorize issuance of writ of garnishment, and apparently a lien on debtor's real estate: Boudwin v. Boudwin, 159 Wash. 262.

§ 199. **Satisfaction.** A judgment is not satisfied by sale of real estate on an execution or order of sale based on such judgment until the sale is confirmed: Mowbray Pearson Co. v. Pershall, 92 Wash. 516.

An attempted satisfaction of a judgment for less than the face thereof, when there is no question as to the validity of the judgment or the amount thereof, has the effect only of a partial satisfaction to the extent of the amount of the payment. The rule of law upon which this statement is based is found in Volume 5, Ruling Case Law, p. 891, which reads as follows:

"The law regards with favor, and seeks to uphold, settlements of pending or threatened litigation, but does not so regard an attempt to discharge an admitted debt by payment of a part of it. It seems to be well settled by authority that a parol agreement by a creditor to accept from his debtor by way of compromise less than is due is nudum pactum and void, and, although payment of the sum agreed upon by way of compromise is tendered, or actually received, it is no discharge of the original debt. This rule, it has been said, rests upon reasons rather more technical than satisfactory; but it was long since adopted, and is supported by very great weight of authority. The general principle, that the acceptance of a less sum in money than is actually due cannot be a satisfaction and will not operate to extinguish the whole debt, although agreed by the creditor to be received upon such condition, rests upon the ground that there must be some consideration for the relinquishment of the excess due beyond the sum paid, something to show a possibility of benefit to the party thus relinquishing a legal right; otherwise the agreement is nudum pactum, for the want of a sufficient consideration to support it."

§ 200. Our supreme court has recognized and enforced this rule in Price v. Mitchell, 23 Wash. 742; Allen v. Farmers and Merchants Bank, 76 Wash. 51, and Strandell v. Strand, 82 Wash. 59.

§ 201. As is shown in the above quotation from Ruling Case Law, this rule is not favored by the courts, and our court, along with many others, has expressed dissatisfaction with the rule and has refused to extend its doctrine and sought to restrict its operation. It has been ready to seize upon anything which could be regarded as a consideration to support the agreement of settlement. See the opinion in Brown v. Kern, 21 Wash. 211, where this question is discussed at length and a settlement upheld where the debtor was financially embarrassed and made a settlement for less than the amount due, payable part in cash and the balance by a secured note. In Williams v. Blumenthal, 27 Wash. 25, it was held that where the time for appeal had not expired, the waiver of right of appeal was sufficient consideration for a settlement for less than the full amount of the judgment. In Russell v. Stevenson, 34 Wash. 166, and Baldwin v. Daily, 41 Wash. 416, compromises were sustained for less than the face of the debt in consideration of a payment before the due date of the debt. More recently, in Conlan v. Spokane Hardware Company, 117 Wash. 378, the court sustained an agreement by a landlord to accept a lesser sum for rent than the amount specified in a

lease, holding as sufficient consideration a showing that the tenant could not, because of changed business conditions, afford to pay the rent stipulated in the lease, and if he had continued to do so, might have been forced into insolvency.

§ 202. However, regardless of the disfavor of the courts towards this principle, it is now and will continue to be the law until such time as the courts repudiate it and refuse to follow the doctrine any longer.

§ 203. **Satisfaction by attorney.** The attorney for the judgment creditor in a judgment has power to receive payment and enter satisfaction thereof (State ex rel. Lane v. Ballinger, 41 Wash. 23) but he "cannot, however, accept anything in satisfaction of the judgment other than that which was sued for and for which the judgment was rendered nor can he accept less than the full amount of the judgment or other than lawful money or enter satisfaction without actual receipt of the money in case of a money judgment": 2 Ruling Case Law, 1005, and cases cited.

§ 204. **Contribution.** When one of two or more judgment debtors pays the judgment, he is entitled to the benefit of the judgment to enforce contribution or repayment from the others if, within thirty days after his payment, he files with the clerk of the court where the judgment was rendered notice of his payment and claim to contribution of repayment: Rem. Rev. Stat., Sec. 593.

LEASES

§ 205. An unacknowledged lease for a term of one year is valid although executed in the month before the term started. In Pappas v General Market Co., 104 Wash. 116, it is said:

> "It is the term, and not the time of the execution of the lease, of which the statute * * * takes account."

In Jones v. McQuesten, 172 Wash. 480, it is held that where there is a consideration going to the entire term of the lease, it is enforceable even though for a longer period than one year and unacknowledged, citing Matzger v. Arcade Building & Realty Co., 80 Wash. 401.

§ 206. A judgment is not a lien on a leasehold interest: Myers v. Arthur, 135 Wash. 583.

§ 207. A lessee's interest in a lease for a term of years may be assigned by a married man without his wife joining: Tibbals v. Iffland, 10 Wash. 451; American Savings Bank & Trust Co. v. Mafridge, 60 Wash. 180, and Anderson v. National Bank of Tacoma, 146 Wash. 520.

§ 208. An assignment of a lease to secure a debt is in effect a chattel mortgage, and should be executed and filed as such: Farmers State Bk. v. Scheel, 124 Wash. 429, and First Nat. Bk. of Lind v. Farm L. & I. Co., 140 Wash. 410.

§ 209. **Liability of assignee.** It is a general rule that an assignee of a lease may release himself from liability for the payment of rent and performing any other covenant of the lease by assigning the lease and surrendering possession of the premises. Our supreme court has so held in the cases of Tibbals v. Iffland, 10 Wash. 451, and Harvard Investment Company v. Smith, 66 Wash. 429. In the first of these cases the court quoted with approval the statement of the rule in Wood on Landlord and Tenant, a part of which is as follows:

> "The assignee may rid himself of all liability to the lessor for rent, and the covenants in the original lease, by re-assigning the lease to any person. He may do this without giving notice to the lessor, or obtaining his leave; and, nothwithstanding a covenant in the original lease that the lessee, his executors or administrators, should not assign without the license of the lessor. There is no fraud in the assignee of a lease re-assigning his interest with a view to getting rid of the lease; hence he may re-assign it to a beggar, or a married woman, or a person leaving the kingdom for the express purpose of relieving himself of liability under the covenants."

§ 210. But this rule is applicable only to the assignee of a lease and does not apply to the lessee where such lessee has covenanted to pay the rent for the entire period: Johnson v. Norman, 98 Wash. 331, and Medgard v. Shimogaki, 135 Wash. 527.

Nor does it apply to an assignee of a lease who has assumed the covenants of the lease. In DeLano v. Tennent, 138 Wash. 39, 44, it is said:

> "But it is said that Tennent, since he was himself an assignee of the original lease, could relieve himself of the

covenants of the lease by an assignment of the lease to another person. But this is the rule only in those instances where the assignor has not assumed the covenants of the lease, and has no other obligation than the obligation to perform such covenants during the time he occupies the premises. Tibbals v. Iffland, 10 Wash. 451, 39 Pac. 102; Medgard v. Shimogaki, 135 Wash. 527, 238 Pac. 574.

"Here, as we have shown, Tennent was not such an assignee. He took the assignment with the consent of the landlord, and as a consideration for that consent agreed to assume and perform all of the covenants of the lease. He thus assumed the relation of an original lessee, and cannot escape the obligation of performance by merely assigning his lease."

LIGHT AND WATER LIENS

§ 211. **Lien for water, electric light and power.** It is a reasonable and enforceable regulation to require payment of arrears for service for water and electricity as a condition to continuing the service to the one in arrears: Tacoma Hotel Company v. Tacoma Light and Water Co., 3 Wash. 316. But without express statutory authority this right does not extend to the refusal to furnish such service to premises until there are paid arrears for such service furnished a prior occupant of the premises: Linne v. Bredes, 43 Wash. 540. This "express statutory authority" was given cities in 1909 by statute (§§ 9471-2, Rem. Rev. Stat.) which reads:

"Cities owning their own waterworks, electric light or power plants, are hereby granted a lien for delinquent and unpaid charges for water or electric light or power, against the premises to which the same has been furnished.

"Said lien may be enforced by cities only by cutting off water or electric light or power against the premises to which the same has been furnished, after the charges become delinquent and unpaid, until such charges are paid. In the event of a disputed account, and tender by the owner of the premises of the amount claimed by him to be due prior to the city discontinuing such a service, the right to so refuse service to any premises shall not accrue until suit has been entered by the city, and judgment entered in such case."

This law was amended in 1933 by adding thereto a provision that the owner of the premises being furnished either light or water, or the owner of a delinquent mortgage thereon, may give written notice to the superintendent or other head of the water works or light plant to cut off service to said premises and from and after the date of the giving such notice the payment or tender of the then delinquent and unpaid charges against such premises for such service and the cut-off charge, the city shall have no lien on the premises for charges for such services thereafter furnished. It is further provided,

> "That such liens shall not be for more than four months' charges due or to become due, nor for any charges which have been due for more than four months."

In Lanterman v. Nestor, 146 Wash. 37, our supreme court held that delinquent water rent due a "city" is an encumbrance against the premises to which the water was served.

There is no statute giving the right of lien, or the right to refuse to furnish service, for water or electric energy for unpaid charges not incurred by the one who is seeking the present service to any other than "cities."

LIMITATION OF ACTIONS

See, ADVERSE POSSESSION, MINORS

LIS PENDENS

See, also, UNKNOWN HEIRS

§ 212. Provision is made by § 243 of Rem. Rev. Stat. for notice of the pendency of an action affecting the title to real property to be given by the plaintiff at the time of filing his complaint or at any time afterwards, or by the defendant, at the time of filing his answer or any time afterwards, when he sets up an affirmative cause of action in his answer and demands substantive relief, and that, from the time of the filing a lis pendens, the pendency of the action is constructive notice to subsequent purchasers or encumbrancers and they are bound by the result of the action.

§ 213. **Extent of judgment.** In Ellis v. McCoy, 99 Wash. 457, 465, the court said that it was the claim of the party whose

interest the lower court had held was barred by a lis pendens that the concluding clause of the lis pendens statute provides that a subsequent purchaser or encumbrancer is bound by the filing of the lis pendens to the extent he would be bound if he were a party to the action, and that had he appeared and set up his claim the court would not have given judgment against him and that the judgment entered could have no more effect inasmuch as he was not a party. The court answered this contention as follows:

> "But we cannot think this the meaning of the statute. We think it means that he is bound by the judgment actually entered to the same extent as if he were a party to the action. The question, therefore, is not would the court have entered a different judgment had he been a party to the action, but to what extent would he have been bound by the judgment actually entered had he been a party?"

§ 214. **Who bound by filing.** The leading cases which decide and discuss very fully those who are bound by the filing of a lis pendens and the extent to which they are bound are Ellis v. McCoy, 99 Wash. 457, and Chaudoin v. Claypool, 74 Wash. Dec. 551. These cases cite practically all of the prior decisions of our court on this subject and the conclusion to be drawn from them is that the filing of a lis pendens does not have the effect of barring a superior outstanding title at the time of the filing of the lis pendens and that between two innocent persons, one of whom must suffer a loss, there should be a weighing of the equities, and that equity be allowed to prevail which favors the person least in fault.

Each of these suits was a controversy between a bona fide purchaser of property and one to whom the property had been awarded by judgment in a suit in which a lis pendens had been filed between the date of the purchase and the filing of the deed. In neither of the cases was the bona fide purchaser a party. In each case the one to whom the property had been awarded claimed that the lis pendens had the effect of making the bona fide purchaser whose deed was not of record a party, and that he was bound by the judgment rendered.

In the Ellis-McCoy case the court held against the bona fide purchaser and in favor of the one to whom the property had been awarded by judgment. In the Chaudoin-Claypool case the court decided that the equities were with the bona fide purchaser and decided in his favor and against the one to whom the property had been awarded. In the one case the bona fide purchaser not only lost the property that he had bought but had the expense of a law suit in trying to get the property. In the Chaudoin-Claypool case, while the bona fide

purchaser succeeded in having the property adjudged to belong to him, he had the annoyance and expense of litigating his rights.

§ 215. **Conclusion.** My conclusion from these cases is that a purchaser or mortgagee of real estate is not safe in paying out his money until after his deed or mortgage is recorded and the records checked to the day following such recording. Mortgagees generally follow this procedure but not all purchasers do and of course purchasers can only follow such a course by depositing the purchase price with a third person to hold until the deed can be filed and the records checked to see that the seller's right to the property has not been conveyed, encumbered or questioned.

MARKETABLE TITLE

§ 216. **Deducible of record.** The cases of Watson v. Boyle, 55 Wash. 141, and Crosby v. Wynkoop, 56 Wash. 475, hold that marketability must be deducible of record. In the Crosby-Wynkoop case the parties had contracted for a good title to be shown by an abstract which is the equivalent of contracting for the marketability of the title to be shown by the records and, of course, parties may contract for such a title. This case may not, therefore, be authority for the statement that a title to be marketable must be deducible of record but the Watson-Boyle case holds squarely that, where a purchaser contracts for "a good and sufficient title," he is entitled to a title "deducible of record."

§ 217. If the holding in this case is carried to its logical result, it would, in my opinion, be almost an utter impossibility to find a piece of property in the state of Washington the title to which is marketable.

Under the discussion of community property, authorities have been cited showing that all property which a married person has acquired by purchase is presumed to be community property and that the community character of the property is not affected by the circumstance that the title stands in the name of one or the other of the spouses. On death of either member of a community, one-half of all community real estate passes instantly to the heirs or devisees of such decedent (Grif-

fin v. Warburton, 23 Wash. 231), and this vested right in such heirs is not lost or destroyed by a subsequent deed from the record owner although a subsequent spouse may join with the other spouse in the deed, (Sengfelder v. Hill, 21 Wash. 371), unless the purchaser has made such inquiry as a prudent person should and unless the deceased spouse of the record owner and those claiming under him or her are estopped by some act of such deceased spouse. See Sadler v. Niesz, 5 Wash. 182; Nuhn v. Miller, 5 Wash. 405; Calhoun v. Leary, 5 Wash. 17; Canadian etc. Trust Co. v. Bloomer, 14 Wash. 491; Daly v. Rizzutto, 59 Wash. 62, and Magee v. Risley, 82 Wash. 178.

If the same proof is required for establishing marital status as that required for proving heirship and it is necessary to have a judicial determination of heirship of everyone in the chain of title who dies during his or her ownership thereof in order to have a marketable title deducible of record, is it not just as essential to have a judicial determination of the marital status of everyone in the chain of title? This question is not asked jocularly but most seriously; and is, I think, fully justified by the holding of our supreme court in the cases of Sengfelder v. Hill, 21 Wash. 371, and Dane v. Daniel, 23 Wash. 379. Of course, all of us recognize that it would be impracticable to insist upon any such requirement. On the other hand, it seems to me the requirement of a judicial determination of heirs is as unreasonable as a requirement of a judicial determination of martial status would be impracticable.

§ 218. **Establishing heirship.** A condition is conceivable where an owner of an undivided interest in property as heir of a common ancestor of the owner or owners of the other undivided interest might be prevented from making an advantageous sale of his interest in the property because of the lack of a judicial determination of heirship of the common ancestor where such ancestor has been dead for more than six years and less than ten years. Under the holding in the case of Murphy v. Murphy, 42 Wash. 142, probate of the estate could be prevented; and an adjudication of the heirs of the ancestor could not be secured in a proceeding against the unknown heirs of such ancestor under § 229 et seq. of Rem. Rev. Stat.. because an heir cannot secure an adjudication of the heirs of an ancestor common with him until after the lapse of ten years from the death of such ancestor: Rem. Rev. Stat., § 785.

§ 219. **Sundry holdings.** The terms "good title" and "marketable title" are synonymous: Watson v. Boyle, 55 Wash. 141.

A marketable title is one deducible of record, reasonably clear from defects which affect its salability: Coonrad v. Studebaker, 53 Wash. 32.

A marketable title is such a title as a reasonably well informed and intelligent purchaser acting upon business principles would be willing to accept: Cummings v. Dolan, 52 Wash. 496.

A good and marketable title is not shown where a title insurance company refuses to insure the title because of an open question regarding defects: Flood v. Von Marcard, 102 Wash. 140.

The established rule regarding a marketable title, was not adopted "to arm and equip the vendee with a sword of defense, in the form of technical and unsubstantial objections, to aid him in escaping liability in the event of his desire to avoid the obligation imposed upon him by the contract": Summy v. Ramsey, 53 Wash. 93.

A deed by a domestic corporation executed by the president and the secretary, and authenticated by the corporate seal, having remained unquestioned for more than seven years, is sufficient to evidence a marketable title, even though there appears no authority for the execution of the deed: Milton v. Crawford, 65 Wash. 145.

§ 220. An encroachment of from 3½ inches to 7⅛ inches is of such a substantial character as to render the vendor's title unmarketable and permit recovery of the earnest money paid: Ziebarth v. Manion, 161 Wash. 201.

MEANDER LINE

See, also, TIDE AND SHORE LANDS

§ 221. A meander line is merely for the purpose of determining the quantity of land for which the purchaser must pay, and not for the purpose of limiting to the meander line the title to the grantee from the United States: Bernot v. Morrison, 81 Wash. 538 (p. 556).

MECHANICS' LIENS

§ 222. **Scope of article.** Mechanics' and materialmen's liens are so intimately connected with real property that it seems well to repeat here the substance of the statement in the Explanatory Note that with few exceptions only those phases of a subject are considered which concern a purchaser or mortgagee of real property.

§ 223. **Unrecorded claims.** A purchaser or mortgagee of real property has no protection by the records, an abstract and lawyer's opinion, or a title policy against the right of liens for which no claim has been filed. The statute gives one entitled to a lien for labor or material ninety days after the cessation of labor or furnishing of material within which to file a claim therefor.

§ 224. **Liability of fee.** Improvements placed on preperty by a lessee or a purchaser under an executory contract may subject the fee title to a lien therefor. The leading recent cases on this question are Pitcher v. Ravven, 137 Wash. 343, and Pioneer Sand & Gravel Co. v. Northern P. R. Co., 170 Wash. 618. These cases discuss very fully the question of liability of the fee for such improvements. From them it will be seen that ordinarily the fee is not liable where permission to a tenant or purchaser is given to build or improve but the lessee or purchaser is not obligated so to do, although it is provided that any buildings erected or improvements made by the lessee or purchaser shall become a part of the real property.

In Pioneer Sand & Gravel Co. v. Northern P. R. Co., supra, it was held that the lien attached to the fee where the lease obligated the lessee to make the improvements, and it was provided that the lessor had a lien on the improvements for rent and taxes, and that while the lessee, if not in default, might remove the improvements at the end of the term, they became the lessor's if not removed.

The majority and dissenting opinions in the case of Brown v. Sesom Corp., 173 Wash. 303, are well worth reading if one is interested in the liability of the fee for improvements placed on property by a lessee under a lease or a purchaser under an executory contract.

§ 225. **Removal of structure.** Section 1146 of Rem. Rev. Stat. provides that,

"When, for any reason, the title or interest in the land, upon which the property subject to the lien is situated cannot be subjected to the lien, the court may order the sale and removal from the land of the property subject to the lien to satisfy the lien."

In Gile Investment Co. v. Fischer, 104 Wash. 613, it was held that this provision was applicable only where the work or material was furnished at the instance of one who owned less than the fee and did not give a right of removal for improvements placed on the premises by the owner of the fee. In Columbia Lumber Company v. Bothell Dairy Farm, 74 Wash. Dec. 597, the court overrules its prior decision of Colby & Dickinson v. Baker, 145 Wash. 584, and as grounds for so doing says:

"In the case of Colby & Dickinson v. Baker, supra, however, the court did not cite or follow the Bell and Cutler cases. It was held that there could be no lien upon the building apart from the land, where a lessee erected the building and the lease provided that the improvements should belong to the lessor in the event of forfeiture. While the statute is not discussed, it is apparent that the court considered the forfeiture clause in the lease paramount to the statute. This position cannot be sustained by authority.

"Treating of this subject, Jones, in his work on Liens (3d ed.), vol. 2, § 1373, says:

" 'In several states the mechanic is given a lien upon the building separate from the land in preference to all prior liens upon the land, and provision is made for enforcing the lien by a sale and removal of the building or other erection. A statute to this effect abrogates in favor of the lien the common-law rule that things attached to the realty become a part of the realty, and that they cannot be afterwards severed without consent of the prior mortgagees of the land. A lien is given, not on the materials as such, but on the buildings or improvements in the construction of which the materials are used. The operation of the statute, in case there is a prior mortgage of the land, is to dissever the improvements from the realty by giving a superior lien on such improvements, and conferring on the purchaser the right to remove them.'

"All our cases but the Colby & Dickinson case support the foregoing text, and place a construction on Rem.

Rev. Stat., § 1146, which not only gives it effect but harmonizes it with other sections of the lien law. Rem. Rev. Stat., § 1129, creates a lien on the building apart from the land. Rem. Rev. Stat., § 1130, creates, under certain conditions, a lien on the land upon which the structure is erected. These conditions are such that, to hold the land, the materials must be furnished on the order of the owner or his agent. And if furnished on order of his agent, the owner must be given notice of delivery, as prescribed by Rem. Rev. Stat., § 1133."

§ 226. **Priority between lien and mortgage.** A mortgage on record before any labor is performed or material is furnished is prior to mechanics' liens, although no money has been paid on the mortgage at the time the lien accrued: Home Sav. & Loan Assn. v. Burton, 20 Wash. 688, and Cutler v. Keller, 88 Wash. 334.

Where a mortgage is agreed upon, and that fact is known to the contractor, the mortgage is prior to the lien of the contractor even though the mortgage was not executed until after work was commenced by the contractor: Jahn & Co. v. Mortgage Tr. & Sav. Bk., 97 Wash. 504.

In determining the priority between a mortgage and a mechanic's lien it must be remembered that the lien relates back to the day that the first labor was performed where the claim is for labor, and to the first day material was delivered where the claim is for material: Nason v. Northwestern Milling & Power Co., 17 Wash. 142.

§ 227. **Limitation on foreclosure.** Section 1138 of Rem. Rev. Stat. provides that,

> "No lien created by this chapter binds the property subject to the lien for a longer period than eight calendar months after the claim has been filed unless an action be commenced in the proper court within that time to enforce such lien; or, if credit be given, then eight calendar months after the expiration of such credit. * * *"

Must this credit be given before the filing of the claim and the fact that credit was given set out in the claim? If credit may be given after the filing of the claim, is it necessary that the fact be placed of record? In other words, can one rely upon the records in determining when the right to foreclose a lien has expired?

In Edwards & Bradford Lum. Co. v. Matthews, 160 Wash. 58, the court assumes and in effect holds that the question of credit or extension of time of payment is one of fact and judg-

ing from the opinion, the giving of credit in that case was not shown by the record.

§228. **When action commenced.** An action to foreclose a mechanic's lien is not deemed commenced against any party until after the complaint is filed and service had on such party: City Sash & Door Co. v. Bunn, 90 Wash. 669, and cases cited.

MERGER

§ 229. Adoption of merger is applicable only in those instances where a lesser and a greater estate unite in the same person and there is no intermediate estate: Fidelity Securities Co. v. Dickinson, 117 Wash. 323.

§ 230. Wherever it is more beneficial to the person taking the fee that the mortgage upon it should stand, that circumstance should control in determining the question of intention, and equity will give effect to it by preventing merger and treating the mortgage as a subsisting charge: Anderson v. Starr, 159 Wash. 641.

MINORS

§ 231. A valid decree affecting a minor's interest can only be obtained by proper service of process and the appearance for the minor by his general guardian or a guardian **ad litem**: Horton v. Barto, 57 Wash. 477; Ball v. Clothier, 34 Wash. 299, and Wyant v. Independent Asphalt Co., 118 Wash. 345.

A minor has three years after removal of disability to bring an action for recovery of real property sold by an executor or administrator: Calderhead v. Smith, 162 Wash. 406.

MORTGAGES

§ 232. **Parties—Description—Signatures.** What has been said under the several subheads of parties, description and signatures under Deeds, is applicable to Mortgages.

§ 233. **Consideration.** Consideration is very fully discussed under the topic **Deeds**, and a number of decisions of our supreme court cited which hold that the general rule is that, except in case of fraud,

> "While a consideration duly acknowledged cannot be contradicted by parol for the purpose of destroying the legal effect of the deed as a conveyance * * * for any other purpose he may show the true consideration. In other words, the fact and manner of payment may be shown by parol."

But the method of stating the consideration in a deed may be such that parol proof will not be admitted to vary, modify or explain a stated consideration and as a general rule the consideration in a mortgage cannot be varied by parol proof.

In Union Machinery & Supply Co. v. Darnell, 89 Wash. 226, the court holds that,

> "* * * an instrument purporting to be a mortgage complete upon its face and unambiguous as to the amount and character of the debt secured,"

is not subject to variation, extension or contradiction by parol evidence.

§ 234. **After acquired title.** In Everly v. Wold, 125 Wash. 467, it is held that,

> "A title subsequently acquired by a mortgagor inures to the benefit of a mortgagee whose debt is still existing and enforceable,"

citing a number of prior decisions of our court as well as decisions from other courts to sustain the holding.

§ 235. **Constructive notice.** It is true as just stated that a mortgage will cover an after acquired title so that as between the parties and anyone with actual notice, the mortgagee will

have protection, but it is not safe to rely on that fact in taking a mortgage from one who has not title at the time of the recording of such mortgage.

A mortgage without the chain of title is not constructive notice to one dealing with property: Atteberry v. O'Neil, 42 Wash. 487. A chain of title covers those instruments made subsequent to the date of the deed by which one acquires title or which are recorded after the recording of the deed by which such title is acquired. Therefore, if a mortgage is made by John Doe on property to which he has no title, and such mortgage placed of record, and thereafter a deed of the mortgaged property is made to the mortagor, dated subsequent to the date of the recording of the mortgage, such mortgage would not be constructive notice to a bona fide purchaser or encumbrancer of the property from John Doe. The reason being that the mortgage is outside the chain of title. A searcher of the records is only required to examine the records for conveyances and encumbrances made by one in the chain of title from the date of the acquisition of a title by him to the date of the recording of the instrument by which he parts with the title. In the case stated the mortgage, being dated and recorded prior to the date of the deed, would be without the chain of title.

Where it is deemed necessary to record a mortgage before the deed to the mortgagor is recorded, it is necessary to meet the condition just above stated that the deed to the mortgagor be dated prior to the date of the mortgage or prior to the date of the recording of such mortgage. This can be done regardless of the date of the acknowledgment of the deed and in either of the cases stated the mortgagor would be in the chain of title because it is necessary for a searcher of the records to examine the indexes for deeds and mortgages made by the grantee in the deed to the date of the deed by which one acquires title.

§ 236. **Purchase money mortgage.** A purchase money mortgage takes precedence over a judgment rendered prior to the mortgage: Bisbee v. Carey, 17 Wash. 224.

An owner of property is not entitled to a claim of homestead against a purchase money mortgage: Lyon v. Herboth, 133 Wash. 15.

§ 237. **Bona fide purchaser.** A mortgagee in a mortgage given to secure a preexisting debt is not a bona fide purchaser: McDonald v. Johns, 62 Wash. 521, and Malm v. Griffith, 109 Wash. 30. A judgment creditor is not a bona fide purchaser and an unrecorded mortgage to a bona fide purchaser is entitled to priority over a judgment: Dawson v. McCarthy, 21 Wash. 314.

§ 238. **Impairing security of junior lien.** Where a mortgagee has released a part of the property originally covered by a mortgage, it is not safe to pass the sufficiency of the lien on the remaining property until it is ascertained that the rights of any junior encumbrancer on the property remaining have not been impaired under the rule that, if the junior mortgage covers only a portion of the land embraced in the senior mortgage and the senior mortgagee, with actual or constructive knowledge of the existence of the junior mortgage and without the consent of the mortgagee in the junior mortgage, releases from the mortgage that portion of the property on which the junior mortgage is not a lien, he will not be allowed to enforce the security against the premises common to both mortgages unless he will first deduct the value of the land so released: 41 Corpus Juris 579, and 19 Ruling Case Law 411, Note 6.

§ 239. **Assumption of debt.** Where a deed provides for the assumption of, and an agreement to pay, a mortgage then on the property and the mortgage contains a covenant to pay the debt, the community of which the grantee in the deed is a member, is liable for the debt: Federal Land Bk. of Spokane v. Miller, 155 Wash. 479.

An oral assumption of a mortgage when it is a part of the consideration is enforceable although there is no assumption in the deed: Hargis v. Hargis, 160 Wash. 594.

In the recent case below cited our supreme court recognizes its prior holdings that where a mortgagor conveys the property to one who assumes and agrees to pay the mortgage that such grantee becomes the primary obligor and the mortgagor the surety, and that it has so held after the passage of our negotiable instrument statute, but they say that in none of these cases was the negotiable instrument statute brought to their attention, nor was it considered by them, and they hold in the instant case that where the debt secured by a mortgage is evidenced by a negotiable instrument the obligation of the maker of the note remains that of primary obligor until he is discharged in one of the ways provided by the negotiable instrument statute. They hold further that the extension of a mortgage which secures a negotiable note by agreement between the grantee of the mortgagor who had assumed and agreed to pay the mortgage debt, without the consent of the original mortgagor and maker of the note, would not release the maker from his liability on the note: Continental Mutual Savings Bank v. Elliott, 166 Wash. 283.

§ 240. **Mortgage a lien.** Section 804 of Rem. Rev. Stat. provides:

> "A mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale according to law."

The effect of this statute, our supreme court says, is to make a mortgage on real property merely a lien thereon and the title does not pass to the mortgagee either before or after condition broken: Dane v. Daniel, 23 Wash. 379.

At common law a mortgage passed the title to the mortgagee so that he was entitled to possession of the mortgaged property. The mortgagor had only what was called an "equity of redemption," which a court of equity recognized by compelling the mortgagee to accept the amount of the debt with interest, etc., at any time prior to such equity of redemption being relinquished or barred by foreclosure. This foreclosure of the equity of redemption was very different from our foreclosure of the lien of the mortgage. The right of redemption given by statute in this state, where the mortgage is only a lien, is purely a statutory one: Hardy v. Harriott, 11 Wash. 460.

§ 241. **Public policy.** The leading and outstanding decision on the effect of the statute above quoted is Teal v. Walker, 111 U. S. 242, which construed a statutory provision of Oregon similar to the Washington statute above quoted. The mortgage in the case under consideration provided that the mortgagor upon default of the payment of the note secured by the mortgage would deliver possession of the mortgaged premises to the mortgagee. The court, in refusing to enforce such a covenant, said:

> "That contract was contrary to the public policy of the state of Oregon, as expressed in the statute just cited, and was not binding on the mortgagor or his vendee, and, although not expressly prohibited by law, yet, like all contracts opposed to the public policy of the state, it cannot be enforced."

This question was before our supreme court in the case of Norfor v. Busby, 19 Wash. 450, and the court approved and followed the Teal-Walker case. It held that our statute providing that a mortgage was not a conveyance and did not give a mortgagee right of possession until foreclosure and sale was declaratory of a public policy, and that a contract which contravened such public policy was unenforceable.

Our court has consistently followed this rule in a number of cases, the last leading cases being Plaza Farmers Union

Warehouse & Elevator Co. v. Tomlinson, 76 Wash. Dec. 109, and State ex rel. Gwinn v. Superior Court, 170 Wash. 463. The last named case is particularly interesting because it draws a distinction between executory and executed contracts. Such distinction reconciles many apparent inconsistent holdings of our court. Our court has, without exception, frowned upon, disapproved and held inffective every scheme and device which as a part of the original transaction sought to deprive a mortgagor of his right of redemption or to give the mortgagee the benefit of the rents, issues and profits or possession of mortgaged property during the period of foreclosure. On the other hand that court has been just as consistent in sustaining any contract between mortgagor and mortgagee which was executed at the time of its making and which had the effect of placing the mortgagee in possession.

§ 242. **Executed contracts.** See in recognition of a mortgagee in possession—an executed contract—Brundage v. Home Savings & Loan Association, 11 Wash. 277; Peterson v. Philadelphia Mortgage & Trust Co., 33 Wash. 464, and Boston & Spokane Realty Co. v. Franc Investment Co., 112 Wash. 113.

The leading case last decided by our supreme court sustaining the right of a mortgagee to possession, rents, issues and profits, etc., under an executed contract is State ex rel. Allen v. Superior Court, 164 Wash. 515. It is well to consider the Gwinn case and the Allen case in drawing the distinction between executed and executory contracts.

§ 243. **When receiver appointed.** Nothing I have said in any part of the discussion of it being contrary to public policy to allow a mortgagee to provide for a receiver or possession at the time of the execution of the mortgage prevents a mortgagee from having a receiver appointed when such action is justified under some equitable principle. The leading cases sustaining such right are Collins v. Gross, 51 Wash. 516, and Newman v. Van Nortwick, 95 Wash. 489. In the Collins-Gross case the fee owner of the property had practically abandoned it and in the Newman-Van Nortwick case the owner was not applying the rents either to interest on the mortgage or on taxes. It was shown that the mortgagor was insolvent and the property not worth sufficient to pay the mortgage debt. The court held that the nonpayment of taxes in such case was a species of waste. This latter case was approved in Straus v. Wilsonian Investment Co., 171 Wash. 359.

§ 244. **Extensions.**

(a) **By Agreement.** In White v. Krutz, 37 Wash. 34, the court makes clear that a mortgagor who retains ownership of the mortgaged property may make a valid contract of exten-

sion of the original mortgage which will be binding upon his subsequent grantee whether such grantee takes with or without notice of such extension. This is true because the extension of time of maturity of the debt secured by a mortgage need not be recorded and the subsequent grantee taking with knowledge of the mortgage must ascertain the condition of the mortgage indebtedness including the time of maturity thereof.

In Hanna v. Kasson, 26 Wash. 568, it was held, where mortgaged premises had been conveyed, that payments subsequently made by the mortgagor on the mortgage indebtedness will not toll the statute of limitations as against such subsequent grantee without his consent.

In Raymond v. Bales, 36 Wash. 493, the court approved the California rule as fully stated and reviewed in Wood v. Goodfellow, 43 Cal. 185, to the effect that, after the rights of an encumbrancer on the land have attached, no act of the mortgagor will have the effect to arrest the running of the statute as against such encumbrancer without his consent and authority.

In Bode v. Rhodes, 119 Wash. 98, the court announced a rule which was inconsistent with that of Raymond v. Bales just cited and, in the later case of Hess v. State Bank of Goldendale, 130 Wash. 147, the court recognized the inconsistencies of its prior rulings and expressly overruled the Raymond v. Bales case. It seems to me safe now for an examiner to follow the doctrine of the Hess case, but only so far as the ruling thereof applies to the facts of that case, which is that as long as the legal title remains in the mortgagor, the relation of mortgagor and mortgagee exists and the mortgagee may safely deal with the original mortgagor without giving any consideration to junior encumbrances.

The Hess case does not decide whether an extension of a mortgage executed by a successor in interest of the mortgagor is good as against the holder of a junior encumbrance who has not joined in or consented to the extension. I do not mean to suggest that the mortgagee may not safely deal with a grantee of the mortgagor who is the owner of the property at the time of the dealing where there are no junior encumbrances but that, until the supreme court clarifies the situation, it is not safe for a mortgagee to deal with a grantee of the mortgagor who is the owner of the property unless an investigation is made to see whether there are junior encumbrances and, if so, that the owners thereof be required to join in or consent to an extension. The supreme court recognized in the Hess case that this question was not then before it or decided by it, for it says:

> "We do not find discussed in the briefs the question whether payments on the mortgage made by the mort-

gagor's grantee will have the effect of tolling the statute as to the subsequent lien. The parties to this action seem to have assumed that his payment would have the same effect as if made by the original mortgagor. For this reason, and in view of the fact that there does not seem to be any showing as to when the original mortgagor ceased making his payments, and in view of the further fact that he was a party defendant in this action and suffered judgment to run against him, we will not discuss that question."

(b) **By Payment.** So long as the debt is kept alive by payment made by one who can thus bind those interested in the mortgaged land, the lien of the mortgage continues. The rule as to tolling the statute of limitations by payment applies to a mortgage debt: Bode v. Rhodes, 119 Wash. 98, and White v. Krutz, 37 Wash. 34. See also note in 41 American Law Reports, § 822.

Will payment by one member of a community keep alive a mortgage executed by both members of a community on community property? It will, if the payment is made by the husband during the life of the community: Catlin v. Mills, 140 Wash. 1. The statute would not be tolled if the payment were made by the wife because she has not the management and control of the community property.

I suggest that, when the community has been dissolved by divorce or death of the wife, a payment by the husband after such dissolution would not toll the statute, for the community ceases to exist on dissolution and the agency of the husband must terminate at the instant of the dissolution.

§ 245. **Payment to record owner.** May one in paying a mortgage rely upon the records as to who is the owner, or must he demand the production and cancellation of the note or obligation secured by the mortgage? Prior to 1897 there was no statutory authority for recording an assignment of a mortgage. One dealing with real property on which there was a mortgage could not depend upon a record satisfaction of such mortgage by the record owner. Nothing short of payment to the true owner was sufficient to satisfy the mortgage, and as every mortgage secures the payment of a note or the performance of some obligation it was necessary to see that the note or other obligation secured by the mortgage had been paid or satisfiied: Howard v. Shaw, 10 Wash. 151, and Fischer v. Woodruff, 25 Wash. 67.

In 1897 our recording act was amended to include assignments of mortgages among the instruments affecting real property which might be recorded in the auditor's office of the

county in which such property was situated. This act provided that when an instrument entitled to record was recorded it was "notice to all the world." Our recording act was amended again in 1927 (Rem. Rev. Stat., §§ 10596-1 et seq.) making clearer the instruments which may be recorded, which include assignments of mortgages, and stating specifically the effect of the failure to record them. Our court has drawn no distinctiou between the '97 act and the '27 act as to constructive notice. It has apparently assumed, if it has not decided, that each act was the same in this regard. See Price v. Northern Bond & Mortage Company, 161 Wash. 690, and Koppler v. Bugge, 168 Wash. 182, 203.

The purpose of this discussion is to determine the proper and safe course to pursue in paying off a mortgage, and it will serve no good purpose to theorize on the possibility of the '27 act not requiring the mortgagor to demand the production and cancellation of the note or obligation secured by a mortgage when paying it off, when our court has held that he must do so in a case which arose after the '27 act went into effect: Koppler v. Bugge, supra.

Let it be understood that we are not considering the reliance one who is dealing with real property may place on the record showing of a satisfaction of a mortgage by the record owner thereof. Our court has held many times that one dealing with real property may rely upon such record showing: Christenson v. Raggio, 47 Wash. 468; Seattle National Bank v. Ally, 66 Wash. 610; Cadwallader v. Sprengle, 131 Wash. 16, and Koppler v. Bugge, 168 Wash. 182, 203.

We are now concerned with whether one who is paying off a mortgage—a present transaction—may rely upon and pay the record owner without requiring the production and cancellation of the note or other obligation which the mortgage secures.

§ 246. The failure to demand the production and cancellation of the note or obligation secured by a mortgage when paying such mortgage may give rise to a controversy involving:

1. Liability of a mortgagor on two mortgages securing the same debt;

2. Liability of the agent of either of the principals to the transaction; or,

3. Priority between mortgages.

§ 247. **1. Double liability of mortgagor.** Where one makes a mortgage and entrusts it to another to pay off a prior mortgage, the mortgagor is liable on such mortgage if the one to

whom it was entrusted fails to carry out the terms of his trust: Kucher v. Scott, 96 Wash. 317, and Nicklisch v. Flynn, 168 Wash. 310, and cases cited.

Such mortgagor is likewise liable on both mortgages where either he or his agent fails to demand the production and cancellation of the note or other obligation secured by a prior mortgage made by him which is being paid off by a subsequent mortgage: Koppler v. Bugge, 168 Wash. 182.

§ 248. **2. Liability of agent.** There is no decision by our court in which an agent was sued on his liability because of failure to call for and have cancelled the obligation secured by a mortgage when paying it off for his principal, but if the law imposes the duty on the mortgagor to require the cancellation of such obligation the same duty would rest on his agent. As I read the opinion in the case of Koppler v. Bugge, 168 Wash. 182, it is authority for the statement that such an agent is liable to his principal for any loss the latter may suffer because of the failure to require the cancellation of such an obligation.

And I suggest that under the authority of the Koppler-Bugge case when one makes a mortgage and empowers the mortgagee therein to pay off a prior mortgage such mortgagee becomes the agent of the mortgagor with the liability for loss above suggested.

§ 249. **3. Priority between mortgages.** It so happens that in every case where there was a controversy between note owners in a prior mortgage which had been satisfied of record by the record owner, and the holder of a subsequent mortgage, the court has held the later mortgage to have priority. In none of these cases has it based its decision on the right to rely upon the record showing of ownership of a mortgage when paying it off. The court has based its decisions on three grounds, viz: A. Agency of the record owner for the note owner; B. "Comparative Innocence" rule; or C. Right of a bona fide purchaser of the mortgage last executed to rely upon a record satisfaction of an earlier mortgage.

§ 250. **A. Agency of record owner.** The first leading case holding that the note owner had made the record owner of the mortgage his agent is Erickson v. Kendall, 112 Wash. 26, and the last such case is Pfeifer v. Heyes, 166 Wash. 125.

(Note: If one is interested in what acts establish an "agency" with authority to satisfy a mortgage it will be well to compare the cases cited in the foregoing paragraph with Ross v. Johnson, 171 Wash. 658; Liska v. Beck-

mann, 168 Wash. 489, and Hink v. Melborn, 74 Wash. Dec. 332. In the two cases last cited it is held that, "An agent merely authorized to collect a debt has no implied power to release the debt or accept anything else than money." In the Ross-Johnson case there is approved the statement in Koppler v. Bugge, 168 Wash. 182, that the burden of proving an agency must be borne by the party who asserts it, as is the rule that,

> "When one advances money to an alleged agent of the holder to satisfy a mortgage and the notes which it secures, it is his duty, at his peril, to see that the person to whom he pays as agent is either (a) in possession of the instrument, or (b) has special authority to receive payment, or (c) has been represented by the owner and holder of the security to have such authority.")

§ 251. **B. Comparative Innocence rule.** Many of the cases are based on what our supreme court has described as the rule of "Comparative Innocence" which they announce to be that, "Where a loss which is occasioned by the wrongful act of a third party must fall on one of two innocent persons, the one whose conduct made the loss possible must bear it." The court in each of the cases in which this rule is applied has regarded the failure of the assignee of a mortgage to record his assignment as tilting the scale of comparative innocence against the assignee of the mortgage. It is well for one interested in this question to read each of the cases which has applied this rule. They are: Erickson v. Kendall, 112 Wash. 26; Kiley v. Bugge, 165 Wash. 677; Nicklisch v. Flynn, 168 Wash. 310; Palm v. Brydges, 169 Wash. 28; Ross v. Johnson, 171 Wash. 658; Northern Bond & Mortgage Co. v. Cowell, 172 Wash. 217, and Beckman v. Ward, 74 Wash. Dec. 309.

§ 252. **C. Right of a bona fide purchaser of the mortgage last executed to rely upon a record satisfaction of an earlier mortgage.** The court held in the case of Koppler v. Bugge, 168 Wash. 182, that when one purchased a mortgage and there was a record satisfaction of a prior mortgage by the record owner thereof such purchaser was a bona fide purchaser under the recording act and that his lien was prior to that of the lien of the unpaid note holders. It is doubtful, however, from a reading of the opinion if the court would have held the satisfaction sufficient so long as the subsequent mortgage was held by the original mortgagee.

§ 253. **Comment.** The case of Koppler v. Bugge, supra, holds that it is the duty of the maker of a note secured by a

mortgage to require its cancellation when paying off the mortgage and that it is negligence on the part of a mortgagee in a new mortgage made to pay off such prior mortgage "not to take up all the old paper outstanding under the old mortgage," which negligence is chargeable to the mortgagor who the mortgagee in the new mortgage represented.

The case of Beckman v. Ward, supra, might be regarded as authority for holding that when one is not obligated to pay the note or other obligation secured by the mortgage it is not his duty to require the cancellation of the obligation as a condition to paying the mortgage if it were not for the fact that the opinion dwells so much on and really bases its holding on the "Comparative Innocence" rule. It would be so easy for the court to say that it was as much the duty of a payor of a mortgage to call for the note or obligation secured by the mortgage as it was for the assignee of the mortgage to file his assignment, and as the one making the payment had the last opportunity to prevent a wrong he should suffer the loss. The "last clear chance" theory applicable to torts may not be appropriate here but it would not be very far amiss in weighing the "innocence" or "equities" of the parties, to hold that the payor of the mortgage had the "last clear chance" of protecting everyone again a wrong by calling for the cancellation of the note or obligation secured by the mortgage he is paying.

§ 254. **Conclusion.** My conclusion is that under the present decisions of our supreme court it is not safe for anyone who is paying off a mortgage to accept a satisfaction from the record owner thereof without requiring the cancellation of the note or obligation secured thereby, regardless of who is the maker of the mortgage or the note secured by such mortgage.

§ 255. **Satisfaction by executor or administrator.** A satisfaction of a mortgage by an executor or administrator, either local or foreign, without court order, is good: Way v. International Portland Cement Co., 100 Wash. 182.

If proceedings on the estate of a deceased owner of a mortgage are not pending in the county where the property is located, then it is necessary to have a certificate of the clerk of the court in which such proceedings are pending that the executor or administrator, as the case may be, who satisfied a mortgage was the qualified and acting executor or administrator on the date of the satisfaction.

With the exception below stated one of two joint mortgagees, or the survivor of them, may release their joint debt: Wall v. Bissell, 125 U. S. 382, and 41 Corpus Juris 802. The

exception to the rule is that where the interests of the mortgagees are several and the notes secured by the mortgage are payable separately to the mortgagees, each several note owner must satisfy his interest in the mortgage: Bank v. Williams (Kas.), 163 Pac. 647, and 41 Corpus Juris 802.

§ 256. **Satisfaction by a married woman.** Our statutes give the husband the management, control and disposition of community personal property. Since a note payable to a married woman is personal property and presumptively community property, it appears logical that the husband would be required to join in a satisfaction of the mortgage; but our supreme court holds otherwise. See Nance v. Woods, 79 Wash. 188, and Bowers v. Good, 52 Wash. 384.

§ 257. **Deed in extinguishment of mortgage.** There are three phases of this question:

A. An endeavor to exclude the right of redemption in a mortgage transaction;

B. The taking of a deed in satisfaction of an existing mortgage and giving an option to repurchase; and,

C. The taking of a deed in extinguishment of an existing mortgage and the debt secured thereby.

§ 258. **A. Excluding right of redemption.** In Plummer v. Ilse, 41 Wash. 5, it is said:

> "'Once a mortgage, always a mortgage', is a well established rule in equity. A deed intended as a mortgage will remain a mortgage until the equity of redemption is cut off, and the parties cannot by stipulation, however expressed or positive, render it anything else."

In this case the court quotes with approval from an opinion by Justice Brewer of the United States supreme court rendered while he was a member of the supreme court of Kansas, as follows:

> "The test is the existence or nonexistence of a debt. And equity looks behind the form to the fact. If the transaction was intended as a loan, if there remains a debt for which the conveyance is only a security, and the collection of which may be enforced independent of the security, equity will hold it a mortgage, no matter whether the transaction is evidenced by one or two instruments."

In Beverly v. Davis, 79 Wash. 537, the parties had at the time of making a loan endeavored to destroy the right of redemption. In holding that courts will look behind the words used by the parties, it is said:

> "The action is grounded in fraud, and equity permits the fullest inquiry, to the end that the intention of the parties may be ascertained and enforced."

In Hoover v. Bouffleur, 74 Wash. 382, the court was considering a carefully studied attempt to make a loan with a deed to property as security appear to be a sale and followed the rule announced in the Plummer-Ilse and Beverly-Davis cases just above referred to.

§ 259. **B. The taking of a deed in satisfaction of a mortgage and giving the owner an option to repurchase the property.** This question is so involved that it is not safe for a layman to endeavor to make such an arrangement without the advice and assistance of his attorney. The leading decisions by our supreme court on this question are Johnson v. National Bank of Commerce, 65 Wash. 261, and Pittwood v. Spokane Savings & Loan Society, 141 Wash. 229. See also note in Lawyers' Reports Annotated, 1916-B, commencing at page 18 and extending to page 610.

§ 260. **C. Deed taken in extinguishment of a mortgage.** I am not considering the endeavor to exclude the right of redemption and avoiding foreclosure by having a deed executed and lodged with the mortgagee or a third person to be used in case the debt is not paid or any device to destroy the right of redemption. That question is considered in the first branch of this subject discussed above. Nor am I considering a case where after default the mortgagee takes a deed and gives the mortgagor an option to repurchase. I am now considering a case where a mortgage has been given and after the same is in default a deed is taken in satisfaction of the mortgage and the debt secured thereby.

Whenever the sufficiency of such deed has been questioned it has been because of a claim that the debt was not extinguished, and the relation of debtor and creditor had continued, so that the rule of "Once a mortgage, always a mortgage" applied. If the debt is extinguished and the transaction what it appears to be on its face, there is no question as to the termination of the mortgage lien and the passing of the fee title by the deed.

§ 261. It is advisable, but not necessary, to have a recital in the deed that the same is taken in satisfaction of the debt

secured by a described mortgage. I recommend a recital in a deed taken in extinguishment of a mortgage, substantially as follows:

> "This deed is an absolute conveyance of title in effect as well as in form, and is not intended as a mortgage, trust conveyance, or security of any kind. The consideration therefor is the full release of every debt and obligation secured by that certain mortgage executed by _____ to _____ recorded in Volume _____ of Mortgages, page _____ of the auditor's office of _____ county, Washington."

The mortgage should be satisfiied of record and the note cancelled and delivered to the maker.

§ 262. **Possession during redemption period.** With certain specific exceptions the statute (§ 602 Rem. Rev. Stat.) gives a purchaser of real property at a sale on execution or on an order of sale on mortgage foreclosure the right of possession, and this right comes into existence at the time of the acceptance of the purchaser's bid by the sheriff: State ex rel Steele v. N. W. & P. H. Bank, 18 Wash. 118.

The exceptions are,

1. Provision in the mortgage that the mortgagor shall have right of possession;

2. Premises occupied by a tenant under an unexpired lease;

3. A homestead properly selected and occupied by a judgment debtor; and,

4. Land used for farming purposes by a judgment debtor.

The first exception needs no comment. The others will be considered in the order of their statement.

§ 263. **Leased premises.** The statute provides that in case of a tenant holding under an unexpired lease the purchaser "shall be entitled to receive from such tenant the rents or the value of the use and occupation thereof during the period of redemption." In Virges v. Gregory Co., 97 Wash. 333, the lessee sought to pay the purchaser a lesser sum than that called for in the lease as the reasonable value of the premises. But the court held that the lease was not terminated by the foreclosure, at least prior to the end of the redemption period, and that the

lessee was liable during that period, and prior to redemption, to the purchaser at the foreclosure sale for the rent stipulated in the lease.

§ 264. **Assignment of rent.** In Security Savings & Loan Society v. Dudley, 75 Wash. Dec. 42, our court held that a purchaser at a sale under a mortgage foreclosure was entitled during the period of redemption to the rents under a lease as against an assignee of such rents from the mortgagor. The assignment was made by operation of law prior to the foreclosure action and there was no intent in making the assignment to defraud the mortgagee or the purchaser at the foreclosure sale. The court said that the case of Griffiths v. Burlingame, 18 Wash. 429, strictly construed, would support the assignment of the rents and that in so far as it was inconsistent with the decision being rendered it was overruled.

§ 265. **Homestead of judgment debtor.** The statute provides that the homestead must be selected as provided by statute and by a judgment debtor. The method of selection needs no comment here. It has been discussed under the head of "Homesteads."

The perplexing question is, Who is a "judgment debtor"? In Northwest Trust & Safe Deposit Co. v. Butcher, 98 Wash. 158, the court denied a right of homestead to one who was not personally liable on a mortgage debt saying that the homestead claimants were—

> "Not judgment debtors either actual or potential. They did not sign the mortgage note, did not assume the mortgage and did not owe the debt. No money judgment was taken or could have been taken against them or either of them."

It was generally assumed following that case that one must be liable on the mortgage debt to be a judgment debtor within the meaning of that term under the statute.

The court held in the cases of Union Central Life Insurance Co. v. Fischer, 169 Wash. 75, and State ex rel. Federal Land Bank v. Superior Court, 169 Wash. 286, that one against whom a judgment might be taken was a judgment debtor although the owner of the mortgage in the foreclosure suit did not take a judgment against him. There was nothing in the questions necessary to the decisions of these cases to effect the holding of the court in the Butcher case, but there were several statements in the opinions which made one wonder if the court might not modify, if it did not overrule, the Butcher case, and such is the effect of the holding of the court in the

case of State ex rel. O'Brien v. Superior Court, 74 Wash. Dec. 11. A personal judgment could not have been taken against the homestead claimant in this case, and yet the court held he was entitled to possession during the period of redemption. A rehearing was granted and the case argued before the court **en banc.** No formal opinion was rendered after the rehearing, but the court announced that they adhered to the departmental opinion.

In the course of the opinion it is said:

> "In order, therefore, that there may be no uncertainty in the law upon this questoin, as we now construe it, we hold that the purchaser of mortgaged premises, when made a party to the suit for foreclosure and against whom the decree runs, becomes a 'judgment debtor', and is entitled to the right of possession under Rem. Rev. Stat. § 602."

§ 266. **Farm lands.** The rule announced in the O'Brien case with respect to a judgment debtor will control in determing the right of one to occupy farm lands.

The statute gives a purchaser under execution or order of sale a lien on crops raised during the period of redemption for six per cent of the purchase price and taxes and assessments paid. Our court holds that this lien is superior to that of a crop mortgage given subsequent to the real estate mortgage: Mount v. Rockford State Bank, 134 Wash. 479.

§ 267. **Effect of redemption.** A redemption by a judgment debtor, or his successor, operates as if there had been no sale, excepting in so far as it eliminates the lien under which the foreclosure sale was had. Such redemption will restore all other liens excepting such as may be otherwise barred by the statute of limitations: DeRoberts v. Stiles, 24 Wash. 611, and Ford v. Nokomis State Bank, 135 Wash. 37.

Where a property is sold at a foreclosure sale for less than the amount of the judgment, and redeemed by the judgment debtor or his grantee, it can again be sold under execution on the deficiency remaining on the judgment after the first sale: Ford v. Nokomis State Bank, supra.

NOTICE

§ 268. **Notice by possession.** In Dennis v. Northern Pacific Railway Co., 20 Wash. 320, the court commenting on notice by possession says:

> "It seems to us that the law is well established that, where a party is in possession of land, even where the public records show the title to be in someone else, the purchaser cannot rely entirely upon the record testimony, but he must take notice also of the rights of those who are in possession. The doctrine's of constructive notice is itself the work of evolution. Actual possession was at one time considered the best and only notice. Symbolical delivery of land by leaf or twig, also, in certain stages of society, met the requirements of justice. But with changing conditions constructive notice by way of registry became necessary for the interchange of real estate. It has never been held, however, to be an exclusive notice, nor to take the place of actual notice." See also Peterson v. The Fidelity Mortgage Trust Company, 33 Wash. 464, and Kuhl v. Lightle, 29 Wash. 137.

This rule applies to easements as well as other rights in property: Kalinowski v. Jacobowski, 52 Wash 359, 368.

§ 269. **Exceptions.** (a) Where one conveys property and the deed is placed of record, the subsequent possession of the property by such grantor is not ordinarily notice of any reservation or exception not set out in the deed (Murry v. Carlton, 65 Wash. 364), unless the possession by the grantor is such as to put a reasonably prudent person on notice of the grantor's claim notwithstanding his deed: Dennis v. Northern Pacific Railway Co., 20 Wash. 320.

(b) It is doubtful if possession of property, the title to which is registered under the Torrens System, gives notice of a claim of right of such possessor unless such right is set out in the certificate of title. In Brace v. Superior Land Co., 65 Wash. 681, 688, it is held that the certificate of registration in the registrar's office at all times speaks the last word as to the title and that to hold otherwise would be to make the Torrens System "but a mere change in the **form** of the recording, a mere modification of the recording act." This construction of the Torrens act was approved in McMullen v. Croft, 96 Wash. 275. The courts which adopt the rule that, under the Torrens System, the **title** is registered and not the evidence of the title,

hold that possession of the property under a claim of right not set out in the registrar's certificate is not notice. See Henry v. White (Minn.), L. R. A. 1916, p. 4; People v. Crissman (Colo.), 92 Pac. 949; Tyler v. Judges of the Court of Registration (Mass.), 51 L. R. A. 433, and Sterling National Bank v. Fischer (Colo.), 226 Pac. 146.

§ 270. **Notice by record.** The laws of Washington provide two systems of record evidence of land titles—the Recording System and the Torrens System. When a title is under one system, the records of the other do not give constructive notice: Brace v. Superior Land Co., 65 Wash. 681, and McMullen & Co. v. Croft, 96 Wash. 275, overruling, on rehearing, 92 Wash. 411.

I hesitate to express an opinion as to what records pertaining to a registered title give constructive notice and shall not further discuss the subject. The remanider of what is here said in regard to notice by record is concerned only with constructive notice by the recording system.

§ 271. Constructive notice is a creature of statute: 20 Ruling Case Law, 342. This rule is recognized by our supreme court in the cases of Howard v. Shaw, 10 Wash. 151, and Fischer v. Woodruff, 25 Wash. 67, holding that, prior to the amendment of the recording act of 1897, there was no authority for the recording of an assignment of a mortgage.

One of the parties in the case of Bernard v. Benson, 58 Wash. 191, contended that the auditor's records did not give constructive notice of an executory contract of sale of real estate because there was no statute in this state authorizing the recording of such a contract but the court concluded that, while an executory contract of sale of real estate was not expressly named in the recording act among the instruments which might be recorded, such a contract was included within the meaning of the words, "deeds, grants and transfers of real property." Another part of the opinion in this case is criticized in the case of Haggerty v. Building Investment Co., 111 Wash. 638 but that does not affect its holding as to notice by recording of an executory contract. Besides the recording act was amended in 1927 to include those contracts among the instruments which may be recorded: § 10596-1, Rem. Rev. Stat.

§ 272. **Recitals.** A recital in an instrument in a chain of title of an unrecorded encumbrance, gives notice of such encumbrance: Peterson v. Weist, 48 Wash. 339.

§ 273. **Statutory liens.** Where a law provides for a lien, the record where such lien is to be ascertained is, of course,

notice. It is under this rule that records of assessments, taxes, judgments and so forth must be axamined.

§ 274. **Decrees.** There is no provision in our statutes making notice a decree in any proceeding in equity or probate. Where such a proceeding affects real estate, a lis pendens may be filed to give notice, but suppose a lis pendens is not filed and a decree is rendered, is the decree notice to an innocent purchaser of the property affected by the decree? This question is answered in the affirmative in Young v. Davis, 50 Wash. 504, where there was nothing in the auditor's office to give notice of a proceeding to foreclose a mortgage and a bona fide purchaser, after the rendition of the decree, took possession of the property and made valuable improvements thereon but the court holds that such decree is, from the date of its entry, constructive notice of the decree itself and all proceedings taken for its enforcement.

PARTY WALL AGREEMENT

See ENCUMBRANCES

PERPETUITIES

See ESTATES

POWERS OF ATTORNEYS

§ 275. The form of general power of attorney in use in this state authorizing the attorney to purchase, receive, take, bargain, sell and convey land, authorizes the attorney to exchange land: Ross v. Kenwood Investment Co., 73 Wash. 131.

Such power of attorney held to apply to after-acquired interests: Auwarter v. Kroll, 89 Wash. 347.

PROBATE PROCCEDINGS

§ 276. **Jurisdiction of probate courts.** In State ex rel. Keasal v. Superior Court, 76 Wash. 291, 298, it is said:

> "In conferring jurisdiction upon the superior courts in probate matters, the constitution makers did not carve out a section of the jurisdiction of the courts of this state and confer it as a limited subject upon the superior courts as probate courts of limited jurisdiction. The failure at all times to observe this fundamental fact has led to some confusion in our own decisions. The constitution simply throws probate matters into the aggregate jurisdiction of superior courts as courts of general jurisdiction, to be exercised along with their other jurisdictional powers, legal and equitable, and as a part of those general powers." See also In re Hamilton's Estate, 108 Wash. 326.

In, In re Wren's Estate, 163 Wash. 65, it was held that a sale of timber separate from the land incident to the partitioning of the land is within the broad partition powers which may be exercised by the superior court in probate proceedings.

See In re Martin's Estate, 82 Wash. 226, as to the extent to which a probate court may go in determinnig title to property.

§ 277. **Notice for letters of administration.** The syllabus to In re Brown's Estate, 170 Wash. 450, reads:

> "No notice need be given of an application for letters of administration filed by a surviving spouse, either before or after forty days from the date of death, under Rem. Comp. Stat., § 1433, dispensing with notice, except where the petition is presented by any one other than the surviving spouse prior to forty days after the death of the intestate."

§ 278. **Debts barred by lack of probate.** Real estate of a deceased person is not liable for debts unless letters testamentary or of administration are granted within six years after the date of the death of such decedent, (Rem. Rev. Stat., §1368, and cases cited), and apparently, after an owner of real estate has been dead for more than six years, probate on his estate can be prevented by one in interest: Murphy v. Murphy, 42 Wash. 142.

§ 279. **Sale by executor.** An executor under a non-intervention will can only sell for the purpose of paying debts, expenses of administration, etc., and a deed by such executor made ten years after the death of his testator is sufficient to put a prospective purchaser on inquiry: Hutchings v. Fanshier, 132 Wash. 5.

§ 280. **Award in lieu of homestead.** An award in lieu of homestead in a probate proceeding merely frees the property so awarded from the burden of all debts provable against the estate. It does not remove the lien of judgments as does a valid homestead declaration: Greer v. Robinson, 149 Wash. 659, and Pratt v. McInroe, 155 Wash. 239.

But it is held in Branche v. Aumiller, 147 Wash. 463, that a judgment creditor, having due notice of an order awarding property to a surviving spouse in lieu of homestead under § 1473, Rem. Comp. Stat., is bound thereby, no appeal having been taken, and cannot subject such property to execution against the survivor, or defeat an action to enjoin the sale and quiet title.

A surviving spouse is entitled to an award in lieu of homestead where it appears that a former homestead declaration was ineffectual because abandoned and not followed by residence: In re Leupp's Estate, 153 Wash. 218.

A non-resident widow is entitled to an award in lieu of homestead in probate proceedings. The law is not strictly an exemption law, but is based upon charity, to prevent dependency, and should be liberally construed: In re Lavenberg's Estate, 104 Wash. 515.

A non-resident widower is entitled to an award in lieu of homestead in probate proceedings, following the doctrine of the above case: In re Johnson's Estate, 114 Wash. 61.

The surviving husband is entitled to an award in lieu of homestead in probate proceedings out of the separate property of his deceased wife, irrespective of the fact that under the laws of another state he became entitled to other separate property of the wife in that state: In re Jarrett's Estate, 138 Wash. 404.

Where an interlocutory decree of divorce has been granted approving a property settlement wherein the plaintiff wife was granted certain properties and moneys, and defendant husband dies before a final decree is entered, the wife is entitled to the $3,000 award in lieu of homestead even though she had presented a claim against her husband's estate for unpaid alimony. The right to an award does not constitute an interest in decedent's estate. It is rather a charge against it, and part of the cost of administration: In re Chisholm's Estate, 159 Wash. 674.

§ 281. **Decree of distribution.** A decree of distribution does not create a title. The function of a decree of distribution is to declare the title which accrues under the law of descent, or under the provisions of a will: Parr v. Davison, 146 Wash. 354.

Adult children not named in a will can be barred by a valid decree of distribution: In re Ostlund's Estate, 57 Wash. 359.

§ 282. **Foreign decree of distribution.** A decree of distribution in a foreign state is not a judicial determination of heirship of real estate in this state: Mace v. Duffy, 39 Wash. 597.

§ 283. **Foreign corporation as trustee.** A foreign corporation named as trustee in a will must qualify as a trust company before it can act as such trustee: In re Wallace's Estate, 164 Wash. 576.

QUIETING TITLE

See also UNKNOWN HEIRS

§ 284. In 1890 an act was passed broadening the right of one having an interest in property to quiet title thereto. This act is a part of § 785, Rem. Rev. Stat. In 1903 an act was passed, now embodied in §§ 229 to 232, inclusive, of Rem. Rev. Stat., which provided that in all actions relating to real property where heirs of a deceased person are proper parties defendant and the names and residences of such heirs are unknown, such heirs may be proceeded against as unknown heirs of such decedent, and which also authorizes proceedings against "all persons or parties unknown claiming any right, title, estate, lien, or interest in the real estate" which is the subject of the action.

§ 285. **Heirs of common ancestor.** In 1911 the act of 1890, providing for suits to quiet title, was amended by adding thereto a provision in regard to suing unknown heirs and providing that the right of a known heir of a deceased person or the successor in interest of such known heir to proceed against the unknown heirs of such deceased person is limited to cases where the plaintiff or his predecessor in interest have been in the possession of the real property involved in the action for ten years, and when during such time no person other than the plaintiff in the action or his grantors have questioned the title of the plaintifffff or his grantors.

§ 286. **Act constitutional.** The statute providing for proceedings against unknown heirs was sustained as constitutional in the case of Phillips v. Thompson, 73 Wash. 78, which is in line with the decision of the United States supreme court in

such cases as Arndt v. Griggs, 134 U. S. 316, and American Land Co. v. Zeiss, 219 U. S. 47.

§ 287. **Lis Pendens.** Too much emphasis cannot cannot be put on the provision requiring a lis pendens to be filed before commencing the publication of summons. This provision reads:

> "Provided, however, that such judgments shall not bind such unknown heirs, or unknown persons or parties, defendant, unless the plaintiff shall file a notice of lis pendens in the office of the auditor of each county in which said real estate is located, in the manner provided by law, before commencing the publication of said summons."

RESTRICTIVE COVENANTS

§ 288. A common owner in a restricted plat may enjoin violation of restrictions: Johnson v. Mount Baker Park Presbyterian Church, 113 Wash. 458, and Tindolph v. Schoenfeld Bros., 157 Wash. 605.

This right may be lost by laches: Ronberg v. Smith, 132 Wash. 345.

See Volume 49, A. L. R., page 1364, for annotation as to what constitutes a "building" in restrictive covenants.

REVENUE STAMPS

§ 289. The fact that revenue stamps in the amount required under the Revenue Act of 1932 are not affixed to a deed, does not affect the validity of the instrument, nor prevent its being admitted as evidence. The Act does not provide that an instrument which does not carry the required revenue stamps shall be refused by the officer who records or registers it. The consequences of a failure to affix revenue stamps to a conveyance as required by the present act are that those who are made

responsible for the stamps not being affixed subject themselves to certain penalties and liabilities.

The Revenue Act of 1932, like the Revenue Act of 1914, does not provide that an instrument which is not properly stamped is invalid or that it is not receivable as evidence.

The supreme court of the United States, in Cole v. Ralph, 252 U. S. 286, in passing upon the effect of an instrument not being properly stamped under the 1914 Act, says:

> "As to the absence of revenue stamps, it is true that the deeds showing title to some of the plaintiffs—they were produced in evidence over the defendant's objection —were without the stamps required by the Act of Oct. 22, 1914, § 331, Schedule A, 38 Stat. 762. But this neither invalidated the deeds nor made them inadmissible as evidence. The relevant provisions of that Act, while otherwise following the language of earlier acts, do not contain the words of those acts which made such an instrument invalid and inadmissible as evidence while not properly stamped. Those words were carefully omitted, as will be seen by contrasting §§ 6, 11, 12 and 13 of the Act of 1914 with §§ 7, 13, 14 and 15 of the Act of 1898, § 448, 30 Stat. 454. From this and a comparison of the acts in other particulars it is apparent that congress in the latter act departed from its prior practice of making such instruments invalid or inadmissible as evidence while remaining unstamped and elected to rely upon other means of enforcing this stamp provision, such as the imposition of money penalties, fines and imprisonment. The decisions upon which the defendant relies arose under the earlier acts and were based upon the presence in them of what studiously was omitted from the later one."

There are two provisions of the Revenue Act now in force as to the effect of the failure to properly affix stamps to a deed. One is that,

> "Whoever makes, signs, issues, or accepts, or causes to be made, signed, issued or accepted, any instrument, document, or paper of any kind or description whatsoever without the full amount of tax thereon being duly paid; * * *
>
> "Is guilty of a misdemeanor and upon conviction thereof shall pay a fine of not more than $100 for each offense."

The other is that,

> "Any person who wilfully fails to pay, collect, or truthfully account for and pay over, any tax imposed by

> Titles IV, V, VI, VII, VIII, and IX, [Title V includes stamp taxes] or wilfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty of the amount of the tax evaded, or not paid, collected or accounted for and paid over, to be assessed and collected in the same manner as taxes are assessed and collected. * * *''

Attention is called to the fact that both he who accepts a deed not properly stamped, and the one who causes such an instrument to be executed or accepted, are subject to the fines and penalties imposed under this law.

STATUTE OF FRAUDS

See TRUSTS; LEASES

STATUTE OF LIMITATIONS

See ADVERSE POSSESSION

STREETS AND ROADS

§ 290. **Acceptance of dedication.** A deed of dedication may be revoked before acceptance, by subsequent conveyance to a third person: Spokane v. Security Savings Society, 82 Wash. 91, and Hanford v. Seattle, 92 Wash. 257.

§ 291. **Width when acquired by user.** In Olympia v. Lemon, 93 Wash. 508, it is said:

> ''The question then arises as to the width of the strip of land acquired by user. In other words, did the user give to the public the right to only that portion actually used in travel, or did it give the right to a sufficient width for street purposes. In Yakima County v. Conrad, 26 Wash. 155, 66 Pac. 411, it was held that after the right to a highway has been acquired by usage, the public are not limited to such width as has actually been used, but have a right to a highway of such width as is reasonably necessary for the easement of travel. * * *

"See, also, Whitesides v. Green, 13 Utah 341, 44 Pac. 1032, 57 Am. St. 740; Elliott, Roads & Streets (2nd ed.), § 174, and cases cited."

§ 292. **Vacation.** Conveyance of a vacated street as a separate parcel fixes the status of such street, and the same thereafter is separate from the adjoining lot: Hagen v. Bolcom Mills, 74 Wash. 42.

Where a vacated street intersects land platted diagonally forming triangular shaped lots, the abutting owners' lines extend in straight line to the center of the vacated street: State ex rel. Patterson v. Superior Court, 102 Wash. 331.

The statute providing for ten "freeholders" to sign a petition for vacation of a county road is not complied with when one of the ten persons signing is a purchaser under an executory contract of sale. Such a person is not a freeholder: Daniels v. Fossas, 152 Wash. 516.

Streets may not be vacated for private benefit. In all instances the order of vacation must have within it some element of public use: Young v. Nichols, 152 Wash. 306.

The general rule that abutters own the fee to the center of the street is controlled by circumstances and where an owner plats land bounded by a street included in the plat, and owns nothing beyond the street, his conveyance of land abutting on the street carries the fee to the entire street. Also, an abutting owner acquires no right to the fee of a vacated street by reason of paymnt of assessments for maintenance and improvements: Rowe v. James, 71 Wash. 267.

It is not necessary for a wife to join a husband in his petition for vacation of an alley abutting on community property as he is the manager of the community property: Fry v. O'Leary, 141 Wash. 465.

§ 293. **Vacation by non-user.** Streets not used for five years are vacated under Rem. Rev. Stat. 6510 and are not rededicated by a deed "subject to all easements, etc.", and in any event the dedication is revoked by a conveyance to a subsequent grantee without any exception: Smith v. King County, 80 Wash. 273.

For a full discussion of vacation by non-user see Lewis v. Seattle, 74 Wash. Dec. 215.

TAXES

§ 294. **Reliance on record.** Where the county treasurer issued a receipt for payment of taxes and a purchaser of the property relied on the showing of payment, the doctrine of estoppel applies and the county is estopped from later showing the taxes unpaid when payment on the check accepted for payment of taxes was refused: Seward v. Fisken, 122 Wash. 225. See also annotation in 73 American Law Reports 152.

§ 295. **Omitted property.** When property has been omitted from the tax rolls or improvements placed on property have not been added to the assessed value, our supreme court never has been called upon to decide whether the property is subject to being taxed for such omitted period as against a purchaser or an encumbrancer. See, as bearing on this question, § 11112 Rem. Rev. Stat. and Brewer v. Dunning, 122 Wash. 358, and for a statement of the general principle of law applicable to the question, 26 Ruling Case Law, p. 351.

§ 296. **Personal property taxes.** Taxes on personal property do not become a lien on real property until specific real property is selected by the county treasurer and the tax entered on the tax rolls, and then only to the then interest of the tax debtor in such property: Scand. Am. Bank v. King County, 92 Wash. 650.

TAX TITLES

See also ASSESSMENTS

§ 297. **Nature of tax title.** A county tax foreclosure proceeding is an action in rem: Noble v. Aune, 50 Wash. 73; Patterson v. Toler, 71 Wash. 535; Continental Distr. Co. v. Smith, 74 Wash. 10; Merges v. Adams, 137 Wash. 208, and McGuire v. Bean, 151 Wash. 474.

A tax deed giving a paramount title cuts off all prior rights under Rem. Rev. Stat., § 11267, including easements and leases: Hanson v. Carr, 66 Wash. 81.

A tax title wipes out the lien of a prior mortgage: Wilson v. Korte, 91 Wash. 30, and Fidelity Securities Co. v. Dickinson, 117 Wash. 323.

It is not necessary for the certificate of delinquency to have been filed with the county clerk prior to publication of summons in order for the court to acquire jurisdiction: Reese v. Thurston County, 154 Wash. 617.

§ 298. **Nature of tax deed.** A tax deed from the county is not a warranty deed. The rule of **caveat emptor** applies to a purchaser at a tax sale: Shelton v. Klickitat County, 152 Wash. 193.

§ 299. **Error in description.** Wherever error in the description of property occurs in the published summons, the court obtains no jurisdiction: Everett v. Morgan, 133 Wash. 225.

§ 300. **Party in possession:** A party in possession at the time of the foreclosure may attack such proceeding irrespective of the three-year statute of limitations: Buty v. Goldfinch, 74 Wash. 532.

§ 301. **Rights acquired by tax title.** No one may claim under a sale for taxes which was made possible by his own breach of covenant: Finch v. Noble, 49 Wash. 578.

A co-owner purchasing at a tax sale merely acquires a lien which he may foreclose: Stone v. Marshall, 52 Wash. 375.

A mortgagee acquiring a tax title against the mortgaged property holds the same as against the mortgagor as a lien for the taxes paid: Maher v. Potter, 60 Wash. 443. This rule applies whether the mortgagee is in possession or not: Shepard v. Vincent, 38 Wash. 493.

But where the tax title has been acquired by another, a mortgagee may purchase the property: Federal Land Bank v. Miller, 155 Wash. 479.

TIDE AND SHORE LANDS

§ 302. Federal courts have repeatedly held that a grant by congress of portions of the public lands bordering on navigable waters conveys the title to ordinary high water mark notwithstanding the meander line may not correspond with such line of ordinary high water: Shively v. Bowlby, 152 U. S. 1.

Land below the government meander line, and above the line of high tide at the time of the admission of the state to the Union, is upland and passes with the government patent of meandered upland: Nassa v. Seaborg, 64 Wash. 164.

A patent from the government prior to statehood passed title to the tide lands included within the meander line where the line was run below high water mark: Bleakley v. Lake Wash. Mill Co., 65 Wash. 215, and Brace & Hergert Mill Co. v. State, 49 Wash. 326 (shorelands).

The government meander line of a lake is not a boundary line and the patent conveys to the actual shore line so as to include a peninsula that was cut off and left outside the meander: Schmitz v. Klee, 103 Wash. 9.

A lake of approximately 25 acres in area, with water 40 to 50 feet in depth, used principally as a pleasure resort, is not navigable in fact when it is not so situated that it can be used as a highway for commerce: Proctor v. Sim, 134 Wash. 606.

The owners of land abutting on an unnavigable lake, even though meandered, take title to the bed of such lake to the center thereof: Bernot v. Morrison, 81 Wash. 538.

Land to which a right to a patent has attached, as well as that actually patented at the time of statehood, is included in a constitutional provision disclaiming title to the tide lands which has been patented by the federal government: Kneeland v. Korter, 40 Wash. 359.

Title to the bed of a navigable stream which changed its course by avulsion before statehood, belongs to abutting land owners: George v. Pierce County, 111 Wash. 495.

But if it changed after statehood, the title to the bed of such navigable stream belongs to the state: Newell v. Loeb, 77 Wash. 182, and Hill v. Newell, 86 Wash. 227.

A meander line of a navigable lake marks the boundary of a grant made prior to the constitution only where the same is below the high water mark, and if the meander is above the high water mark, the owners took title to the land to the high water mark: Van Siclen v. Muir, 46 Wash. 38.

A grant from the state of shore lands covers all the land between high water mark and the navigable waters—that is, the deeds of the shore owners carry title to the line of navigability as it may be fixed: State v. Sturevant, 76 Wash. 158.

TRUSTS

§ 303. Where, for any reason, the legal title to property is placed in one person under such circumstances as to make it inequitable for him to enjoy the beneficial interest, a trust will be implied in favor of the persons entitled thereto: Seventh Elect Church in Israel v. First Seattle Dexter Horton Nat'l. Bank, 162 Wash. 437.

§ 304. But an express trust cannot be proven by parol: Farrell v. Mentzer, 102 Wash. 629, where trusts are fully discussed and classified.

§ 305. **Precatory trusts.** A very full discussion of precatory trusts is given in In re Hochbrunn's Estate, 138 Wash. 415.

UNKNOWN HEIRS

See also QUIETING TITLE

§ 306. Proceedings against unknown heirs was discussed under the topic QUIETING TITLE, § 284. Particular attention is called to what was there said as to a suit by an heir against unknown heirs of a common ancestor and the necessity of filing a lis pendens to make any judgment rendered effective as to unknown heirs.

VENDOR AND PURCHASER

See also EXECUTORY CONTRACTS

§ 307. A contract to sell real estate must be in writing and signed by the vendor: Lombard Investment Co. v. Carter, 7 Wash. 4.

It is not necessary that the contract be signed by the purchaser: Wright v. Suydam, 72 Wash. 587.

A vendor may contract to sell before he acquires title: Webb v. Stephenson, 11 Wash. 342.

WATER, LIEN FOR

See LIGHT AND WATER LIENS

WILLS

§ 308. **Finality of order admitting will to probate.** After the lapse of the time fixed by statute for contesting the will only those expressly permitted to contest the will may do so and for the causes specified in the statute: Laack v. Hawkins, 155 Wash. 308, and cases cited.

§ 309. **Election by surviving spouse.** A surviving spouse is not put to an election by the will unless specific property of the restator is willed to such spouse: Herrick v. Miller, 69 Wash. 456.

§ 310. **Children.** The declaration in a will that the testator makes no provision for "my children" or "any child which may hereafter be born," sufficiently names the children to prevent intestacy as to them: Gehlen v. Gehlen, 77 Wash. 17.

An adopted child, not mentioned in the will of a natural parent, inherits from both natural and adoptive parent: In re Estate of Paul Roderick, 158 Wash. 377.

§ 311. **Holographic and nuncupative wills.** A holographic will is valid in this state, if valid in the state where made: In re Estate of Liebenwald, 132 Wash. 26.

But a nuncupative will is not effective to pass title to real property: Irwin v. Rogers, 91 Wash. 284.

§ 312. **Contracts to devise.** Contracts to devise property are not looked upon with favor by the courts and must be "established by evidence so strong and clear as to leave no doubt, and when the result of enforcing them would not be inequitable or unjust": Whitaker v. Titus, 166 Wash. 225.

§ 313. **Power to mortgage.** It is held in Russell v. First National Bank, 169 Wash. 430, 437, that a provision in a will that the testator's wife who was named as executrix should "have the full right to sell or otherwise dispose of" property, gave the right to mortgage the property.

§ 314. **Revocation by marriage.** Section 1399, Rem. Rev. Stat., provides that a will is revoked by a subsequent marriage

unless provision be made for such survivor by marriage settlement or unless such survivor is so provided for in the will as to show an intention not to make provision, and that "no evidence to rebut the presumption of revocation shall be received."

In In re Hall's Estate,, 159 Wash. 236, the court held that a provision in a woman's will for "my husband" showed an intent not to provide for him out of her separate estate.

§ 315. **Revocation by divorce.** Section 1399 of Rem. Rev. Stat. also provides, "A divorce, subsequent to the making of a will, shall revoke the will as to the divorced spouse." Our court held in In re Ziegner's Estate, 146 Wash. 537, that a provision in a husband's will, naming his wife a beneficiary, was revoked by a subsequent divorce granted to her.

ZONING ORDINANCES

§ 316. The validity of one provision of the Seattle zoning ordinance was passed upon by the supreme court of the United States in the case of State ex rel. Seattle Title Trust Company v. Roberge, 278 U. S. 116, reported and fully annotated in 86 American Law Reports, p. 654. The syllabus to the opinion gives a clear statement of the holding of the court. It reads:

> "1. Zoning ordinances must find their justification in the police power exerted in the interest of the public.
>
> "2. A provision of a zoning ordinance making the right to maintain a home for aged persons within a particular district depend upon consent of the owners of two thirds of the property within 400 feet of the proposed building violates the due process clause of the Federal Constitution.
>
> "3. Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities.
>
> "4. The right to devote real estate to any legitimate use is property within the protection of the Constitution."

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